

C5V0RNCA Argument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DINLER, et al,

Plaintiff,

v.

04 CV 7921

CITY OF NEW YORK, et al,

Defendant.

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New York, N.Y.

May 31, 2012

3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

For Plaintiff:

CHRISTOPHER T. DUNN
NEW YORK CIVIL LIBERTIES UNION

MICHAEL L. SPIEGEL

JONATHAN C. MOORE
BEDLOCK LEVINE & HOFFMAN LLC

For Defendant:

JEFFREY ADAM ROTHMAN

PETER GERARD FARRELL
NEW YORK CITY OFFICE OF CORPORATION COUNSEL

1 (Case called, in open court)

2 THE COURT: All right. My preference would be to have
3 everybody have a seat if we can, so try to find a seat. Great,
4 thanks.

5 All right. We are here on the parties' motions for
6 summary judgment, which is a mountain of material. And I
7 was tempted to just stack it to see how high it went, but I
8 didn't have the insurance for it, so. And then there's hours
9 of video footage. I have been through it all. It's a lot of
10 material, even though this is an abbreviated motion, really,
11 for summary judgment on issues that the parties believed would
12 sort of help get the ball rolling and were sort of the clearest
13 examples as to why summary judgment was appropriate.

14 So I have looked at those materials, I have received
15 correspondence from the parties as to how we're going to divide
16 up the argument today. Got my chess clock, you each get an
17 hour. And I'm going to stick to it, just because I think we
18 could go all night, otherwise. So I am going to hold you to
19 it, so be strict. If you are dividing up arguments, make sure
20 that you stick by your deadlines, because otherwise you are
21 taking from others.

22 So, remind me of how we're gonna do this.

23 MR. DUNN: Your Honor, I'm going to start, and then
24 Mr. Spiegel is going to go, and then Mr. Moore.

25 THE COURT: Okay. And do you have time?

1 MR. DUNN: We're going to take about 40 minutes of our
2 time now on the cross-motions on the false arrest claims. And
3 we'll reserve 20 minutes for response on those motions, as well
4 as the no summons policy.

5 THE COURT: All right, so 40 now, and then 20 as
6 rebuttal?

7 MR. DUNN: Yes.

8 THE COURT: For the City?

9 MR. FARRELL: We are going to address our -- we moved
10 at the same time on the two arrest locations, so we'll address
11 our motions, as well as proposed plaintiffs' motions on Church
12 and Fulton and 16th Street, and we will then go directly into
13 our motion on the no summons and fingerprint policy. And my
14 intent is to reserve either 5 or 10 minutes of that time so
15 that we will have a final rebuttal.

16 THE COURT: All right. And I think that's fair, since
17 they're the only ones moving, there's not cross-motions for the
18 ones you are reserving on.

19 Okay. All right, I have got the court security
20 officers here since we have a number of people standing. I
21 want to make sure that's all right. I have additional chairs
22 in the jury room that we can use. Should we take a minute to
23 do that?

24 THE MARSHAL: Yeah.

25 THE COURT: Thank you. If I had known it was going to

1 be this many folks, I might have arranged for a larger
2 courtroom.

3 Thanks.

4 (Pause)

5 MR. FARRELL: While waiting for that, I just wanted to
6 ask the Court to make sure that you received our letter
7 regarding the Bernini case out of the Eight Circuit that we
8 sent in after the summary judgment motions were fully
9 submitted. That case was just decided in the beginning of
10 2012.

11 THE COURT: I'm all over it. I'm all over it.
12 Nothing happens in the Eighth Circuit, that I don't know.

13 Okay, are we ready?

14 All right. So, Mr. Dunn, you are going to lead off?

15 MR. DUNN: I am.

16 Good afternoon, your Honor. This is moment that has
17 been a long time in coming. But the passage of time has done
18 nothing to diminish the importance of the issues before you
19 today. With over 1800 arrests at the Republican National
20 Convention of 2004, that stands as the largest number of
21 arrests in American presidential convention history.

22 We are here, today, to talk about the two largest mass
23 arrests in 2004 that involved nearly 600 people at Fulton and
24 East 16th Street. And those arrests, your Honor, sent a very
25 loud and destructive message. And that message was, if you

1 were a protestor, if you were a legal observer, if you were a
2 journalist covering a protest, if you were a member of the
3 public watching a protest from a public sidewalk, or you were
4 just a bystander in the vicinity of the protest, you could be
5 summarily swept up by the police, arrested, handcuffed,
6 fingerprinted, in some instances held for days, having done
7 nothing wrong.

8 And we are here, today, to ask you to send an equally
9 powerful message that when police officials act unreasonably
10 and they violate the Constitution, they will be held
11 accountable in federal court and, hopefully, that this message
12 will be heard loudly and clearly by protestors in the future,
13 and by police commanders in the future.

14 THE COURT: All right, on tapes, I heard some
15 protestors saying: I don't need a permit, the only permit I
16 need is the Constitution.

17 Do you agree with that?

18 MR. DUNN: In many instances, I absolutely agree with
19 that --

20 THE COURT: Do you agree with that at Fulton Street?

21 MR. DUNN: Absolutely. New York City, you do not need
22 a permit to march on the sidewalk, but you do not need to reach
23 that. Because we win, regardless of whether or not a permit
24 was required, because a permit was granted. But I will --

25 THE COURT: And with respect to East 16th Street, are

1 you suggesting everybody was on the sidewalk?

2 MR. DUNN: No, your Honor.

3 THE COURT: No.

4 MR. DUNN: I'm not suggesting that at all.

5 THE COURT: Did they have a permit there?

6 MR. DUNN: There was no permit there.

7 THE COURT: And are you suggesting that the
8 Constitution was the only permit that was needed to parade in
9 street with a band and with dancing and --

10 MR. DUNN: No, your Honor, that's not the issue on
11 East 16th Street. The issue on East 16th Street is, and it's
12 undisputed, the police sent a large group of people who were in
13 the street -- regardless of what you may think of that -- in
14 the street, into a bustling city block on a summer evening that
15 hundreds of people on it, who had nothing to do with that
16 event. And they sealed off both ends of the block. And
17 someone, for instance, like our client, Dinler, who was just
18 completely emblematic of other people, she's just walking down
19 the block. She tries to get out at each end, she cannot get
20 out. She ends up essentially having a panic attack and
21 collapsing in the street and is taken to a hospital. She
22 didn't need a permit to be walking down East 16th Street to go
23 to work. And the people who were watching that event from the
24 sidewalk didn't need a permit to be watching it. And the
25 problem with East 16th Street is, whatever you may think about

1 some of the people who went into the street initially, there
2 were a huge number of people who anyone would recognize were
3 completely law-abiding people who just happened to be on a City
4 block on a summer evening. So if I can, let's turn to the law,
5 because we are obviously going to get to that. The way we
6 structured this is I'm going to talk about the law with
7 respect -- that covers both locations. Mr. Spiegel will talk
8 about Fulton Street. Mr. Moore will talk about East 16th
9 Street. As you mentioned, you have had a lot of materials
10 thrown at you. And I recognize that, from prior dealings with
11 you, you will be the most prepared person here in the room --

12 THE COURT: I don't know that, it's a big room.

13 MR. DUNN: I know that. And our goal here is to show
14 you the simple, clear path we have to summary judgment. And it
15 starts with the recognition, we had damage claims here.

16 The defendants have asserted qualified immunity. So
17 the ultimate issue you have to decide is whether or not a
18 clearly established right was violated. And to be clear, the
19 right that we claim was clearly established as law in 2004 was
20 the right for an individual not to be arrested without
21 individual probable cause, regardless of whether or not they
22 were in the vicinity of unlawful activity.

23 And I don't think anyone disputes that right was
24 clearly established at the time. And in conjunction with that,
25 the City bears the burden, since these were warrantless arrests

1 of proving probable cause. It's their burden.

2 So then we go back to the premise we started with
3 about a year ago with you. It's undisputed the City can say
4 nothing about any unlawful activity about any of the
5 plaintiffs. There are court orders to that effect in all of the
6 cases.

7 THE COURT: Just so we are clear, Judge Francis made,
8 you know, issued an order in which he made it clear that the
9 City was offering no law enforcement witness --

10 MR. DUNN: No.

11 THE COURT: -- who can testify to that.

12 But let me just focus on what Judge Francis said.

13 MR. DUNN: Okay.

14 THE COURT: But he didn't foreclose the ability to
15 introduce evidence.

16 MR. DUNN: Well, I have got -- the order in our case,
17 for instance, says: Defendants have no personal knowledge of
18 plaintiff's actions, this includes any member of the NYPD.

19 THE COURT: Uh-huh. But I mean so this is Judge
20 Francis' order from November 28, 2006 in McNamara, Abdel and
21 Adams to say: Defendants are deemed to have admitted that with
22 respect to each plaintiff in those three cases, they cannot
23 identify any member of the NYPD who has personal knowledge of
24 individual conduct of that plaintiff which served as the basis
25 for that plaintiff's arrest. This does not preclude the

1 defendants from presenting evidence that a plaintiff was within
2 a group of individuals allegedly engaged in unlawful activity,
3 or from arguing that such evidence is sufficient to demonstrate
4 probable cause.

5 It's that last sentence that I'm not sure exactly what
6 he had in mind. But I think if I have a hunch, I think it's to
7 talk about a group probable cause as a theory.

8 MR. DUNN: Yes.

9 THE COURT: But it might also be about whether or not
10 there is, perhaps, you know, a video that shows a particular
11 person clearly -- clearly engaging in unlawful conduct that
12 would constitute probable cause for that individual.

13 MR. DUNN: Your Honor, it may be that he allowed that.
14 I know that in our case, and I think it's true in most cases,
15 he ordered that the City had no knowledge about any actions by
16 the individual. And I grant you, recognizing they can say they
17 were there -- and of course they were there. But the point is
18 that we are starting from the premise -- and I think for the
19 purposes of summary judgment, it is certainly true that the
20 City doesn't have any information about any individual unlawful
21 activity by any of the plaintiffs.

22 Normally, that would be the end of the discussion.
23 Normally, plaintiff would win.

24 THE COURT: But they have attached videos. I have
25 seen people parading on the street, right? If I conclude they

1 were parading without a permit, that's evidence of unlawful
2 activity, right?

3 MR. DUNN: That may well be, and if they can identify
4 specific people on specific videos who were doing that, that
5 takes us out of the premise of these motions.

6 As you may recall, the premise of these motions -- and
7 it is certainly true with the plaintiffs in our cases and I
8 believe it is true in most cases, is the City, in fact, through
9 video or anything else, has no ability to identify particular
10 individuals who engaged in unlawful activity. But more
11 importantly, for any individual plaintiff can't say that that
12 person was doing something unlawful.

13 THE COURT: All right. Well, I'll hear what the City
14 has to say about that, because I do think there is a certain
15 amount of interpretation of Judge Francis' order in one or more
16 of the cases that might be worth hearing about. But you're
17 basically saying, I think, that there is no group probable
18 cause theory that can be proceeded upon.

19 MR. DUNN: That's right. They want to proceed on a
20 group probable cause theory.

21 THE COURT: Which the DC Circuit and now the Eight
22 Circuit have recognized. To a point.

23 MR. DUNN: Well, let's be very careful about that.

24 THE COURT: To a point.

25 MR. DUNN: Okay. To a point. Okay.

1 First, the Supreme Court has never recognized that.
2 The Second Circuit has never recognized it. In fact, it
3 rejected it in the one case where it was raised, which is Jones
4 vs. Parmily. There are the other two cases you mentioned,
5 there's a DC Circuit case Carr, another Circuit case, Bernini,
6 that's what the City hangs its hat on. And the question is, is
7 what happened here the same thing as what happened there. And
8 I think, clearly, the answer to that is no. Carr, and I know
9 that you --

10 THE COURT: The answer to, what, is no?

11 MR. DUNN: Whether or not what happened here is the
12 same thing that happened in those two cases.

13 In Carr, as I'm sure you know, we have an actual riot
14 happening. We have people lighting things on fire, throwing
15 rocks through bank windows, throwing rocks through police
16 cruiser windshields. There's a police officer affidavit that
17 identifies every single person in the crowd as engaging in
18 unlawful activity. They were steered into an alley, late at
19 night, that is otherwise secured, and they arrest people. And
20 they charge them with a rioting offense.

21 Similar situation in Bernini, with one twist that is
22 relevant. Rioting happening. They identify a discrete group
23 of people. They then chased them into a space where there are
24 other people, to be sure. They then spent a lot of time
25 separating the other people. They ended up taking 200 people

1 out of that group and they are left with 160 arrestees.
2 Neither of those cases changes the core Fourth Amendment
3 principle that you have to have individualized probable cause
4 for every person who gets arrested. They just described a
5 unique or very narrow set of circumstances in which you can do
6 that by relying upon information about a group. And there,
7 which you had, was you have to have. First, you have to have
8 an assembly-type offense. Both of those are rioting type
9 offenses.

10 THE COURT: Do you think it turns on rioting, as
11 opposed to just unlawful parade?

12 MR. DUNN: Absolutely. In the sense that in both of
13 those cases, your mere presence and proximity to rioting was an
14 element of the offense. That's very different than parading
15 without a permit, where you have to show the individual is
16 violating the statute. Whether they are doing it next to
17 somebody else or not is completely irrelevant. So what makes
18 those cases work, is the fact that you have an assembly of
19 related offenses. That is one.

20 Secondly, both of those cases, the Court said, there
21 was evidence to show that every single person in the group was
22 engaged in unlawful activity. That is the touchstone of the
23 Fourth Amendment.

24 And, third, you had to be sure, at the end of the day,
25 that the people who got arrested, were only the people who were

1 engaged in the unlawful activity. So, for instance, in Carr
2 you have people in an alley late at night, some of the people
3 who are left. In Bernini, they had this whole process of
4 pulling people apart.

5 THE COURT: Right. But they -- if you look at the
6 numbers in Bernini, it seems like if you to go back to the
7 analogy that has been used before, they have a few dolphins
8 with tuna, right. And the Court says, well, that doesn't have
9 to be that that can't happen.

10 MR. DUNN: We are not saying it can't happen, your
11 Honor. There, they took out 200 people, okay. The vast
12 majority of people -- the majority of people who were in that
13 location, got taken out, removed, and were not arrested.

14 THE COURT: More got removed than were arrested.

15 MR. DUNN: More got removed than got arrested, and
16 there was a sustained effort to remove people who they did not
17 believe were part of the group.

18 THE COURT: The nature of the sustained effort is not
19 exactly clear in the Eight Circuit cases, it seems to me. I
20 mean they throw the numbers around, but it's not clear exactly
21 what they did to separate dolphins and tuna.

22 MR. DUNN: That's fair enough. But I think what is
23 clear, is that the principle that both those cases still
24 recognize, and they cannot change this because this is Supreme
25 Court law. You have to, at the end of the day, conclude -- or

1 that a reasonable officer would have concluded that everybody
2 getting arrested had engaged in unlawful conduct. Even if you
3 are wrong for a few people, you still have to reasonably
4 believe that.

5 And with respect to the two locations, I'm going to
6 turn this over to Mr. Spiegel and Mr. Moore. But the short of
7 it is, at Fulton Street, whatever you may think about the
8 cohesiveness of the people there -- and I don't think that is a
9 cohesive unit, when you look at the video. It is our position
10 that no reasonable officer could have concluded -- and you can
11 look at the video -- that everybody walking on that sidewalk
12 had violated the law at East 16th Street and, therefore, they
13 don't come close to qualifying to Bernini, setting aside there
14 is no rioting that has taken place. We don't think that Carr
15 and Bernini are even eligible here. But, on the facts, they
16 are very different. With East 16th Street, whatever you may
17 think about what happened at the beginning of that event and
18 whatever you may think about what some people did on East 16th
19 Street, it is undisputed that the police diverted this whole
20 group of people into a city block that had all kinds of people
21 in it who were just there minding their own business. And the
22 undisputed evidence of record shows they did very little, and
23 certainly not enough, to assure that the only people getting
24 arrested were people engaged in unlawful activity. And, not
25 surprisingly, a lot of innocent people got arrested. You know

1 this is a city block on a summer evening that was full of
2 people.

3 All right, so with that, I'm going to turn it over
4 because the chess clock is running, and I understand the issue
5 about chess clocks. The one thing I would ask, later on, if
6 you have questions about the fingerprinting claim, I will of
7 course address them.

8 THE COURT: Are you planning to -- is somebody
9 planning to address that at some point?

10 MR. DUNN: I will address it when we respond to the
11 City, because I want Mr. Spiegel and Mr. Moore to get up.

12 THE COURT: Okay.

13 All right, Mr. Spiegel, you are talking about Fulton
14 Street.

15 MR. SPIEGEL: About Fulton Street.

16 Your Honor, in the Bernini case, the Eighth Circuit
17 said that the touchstone of the Fourth Amendment is
18 reasonableness under the circumstances presented. And the
19 context, the circumstances presented at Fulton Street, was a
20 peaceful sidewalk protest where arrests were simply
21 unreasonable. It was unreasonable to believe that the sidewalk
22 was obstructed under New York law. It was unreasonable to
23 believe that the sidewalk did not contain members of the media,
24 passers by, legal observers. That everyone, it was
25 unreasonable to think, that everyone there, even if you

1 accepted the City's position that they gave conditions to the
2 marchers, it was unreasonable to believe that everyone on that
3 sidewalk, at the time that the march was stopped and the group
4 was surrounded was, in fact, a marcher. It was unreasonable to
5 believe that the dispersal order which is depicted on the
6 police videotape number 62, TARU 62, which has that dispersal
7 order as much as it existed in any way.

8 It is a matter of law that you can decide that that
9 dispersal order did not, was not designed to enable the 227
10 people stretching all of the way back to Church street, was not
11 designed for them to hear it, and did not give the people who
12 were trapped on that sidewalk sufficient opportunity to respond
13 to the dispersal order before everyone was arrested. It was
14 unreasonable to summarily arrest people on that sidewalk
15 without dispersal orders after having granted permission for
16 that march to proceed. Even if you accept the City's position
17 that Galati reasonably believed that the announcement that he
18 gave amounted to conditions for a march beyond simply saying
19 you cannot obstruct the sidewalk, even if you accept that, even
20 if you accept that it was reasonable to believe that everyone
21 who engaged in the march heard that announcement, even if you
22 accept that it was reasonable to believe that some marchers may
23 have even violated those conditions, it was unreasonable to
24 believe that everyone on the sidewalk when the arrests took
25 place were in fact the people those conditions were addressed

1 to, accepting their terminology.

2 As to the marchers themselves, accepting the fact that
3 the police can set certain types of crowd control conditions
4 and measures, which the City calls conditions, violation is not
5 an obstruction of governmental administration. And I think
6 that is adequately addressed in the papers submitted by the
7 NYCLU on our motions. And you cannot arrest everyone because
8 you perceive a few people to have violated some kind of
9 conditions that you have set in order to control the march.

10 Let's look at what happened there from the beginning.
11 The police knew about this protest. They knew in advance that
12 this march was going to take place. They knew it was intended
13 to be peaceful, it was called by a passivist organization.
14 They knew that they planned to walk on the sidewalk to get as
15 close to Madison Square Garden as they could. They had to
16 know, once they arrived, that what they were seeing was
17 entirely consistent with what they knew from their intelligence
18 ahead of time. It was peaceful. There were no incidents with
19 the police. There was no violence. There was no -- there was
20 just nothing, except a gathering of people, and the other
21 people who were there to visit the World Trade Center site.
22 You see them all on the video.

23 This was a gathering of people to express themselves
24 on issues of war and peace it attracted members of the media.
25 You can hear on the videos the police repeatedly addressing the

1 media. They were well aware that they were there. And it was
2 near a tourist attraction where you can see passersby walking
3 by.

4 The police then conferred with one of the organizers,
5 Mr. Hederman. Everything about that conversation that is
6 recorded on the videotape is consistent with cooperation with
7 the police to have a peaceful, lawful march on the sidewalk.
8 Once that march started -- and it is -- the critical moments
9 are from the time the march started until it was stopped,
10 because the conditions on the sidewalk, once the march was
11 stopped by Monahan and Galati, certainly could not constitute
12 obstruction --

13 THE COURT: Did Galati stop it?

14 MR. SPIEGEL: Galati says that he did. And he is seen
15 in that video with his hand on the front pole of this TARU 62.
16 He's there with Monahan, and puts his hand up to stop the front
17 pole of the banner. He claims it was a joint decision with
18 Monahan to stop the march. The person who speaks on the video
19 is clearly Monahan, the one who seems to be --

20 THE COURT: Well there's a point on the video where
21 Galati seems to be telling people to move closer to the fence,
22 or they are not going to be able to go forward with the march.
23 But he says that after Monahan has already made an order that
24 people are already getting arrested.

25 MR. SPIEGEL: He does say that. And that's very

1 confusing. He later claimed in a deposition that he had
2 participated in the decision, jointly.

3 What's strange about -- what is unreasonable and --
4 strange and unreasonable about the circumstances, is that the
5 defendants now claim that despite everything they knew about
6 that march when it started, that once people stepped onto the
7 Fulton Street sidewalk, the marchers gave up their intent to
8 get as far as Madison Square Garden, lawfully. The media gave
9 up their intent to observe what was going on. And any
10 uninvolved passersby decided to stop being uninvolved and then
11 collectively these people decided to join together to obstruct
12 the sidewalk. That is an unreasonable conclusion. There is
13 not a single iota of evidence that supports it.

14 Monahan and Galati had to have known that there were
15 pedestrians and media on that sidewalk. And the best evidence
16 is the video. If you look at the videos taken before the march
17 begins. For example, the Burns video, who is one of the
18 marchers. He is on the west side of Church Street, amongst the
19 marchers. And in about a minute and 30 seconds in, he holds
20 his camera up and you can see the other side of Church Street.
21 There are, literally, dozens of people walking on the Fulton
22 Street sidewalk, up and down Church Street and around the
23 corner, on both sides of the Fulton Street sidewalk, before the
24 march begins. After the march begins, you can hear on that
25 same Burns video Monahan's distinctive voice telling media to

1 get out of the street, onto the sidewalk. He, at no point,
2 says that anything is going on on that sidewalk which
3 constitutes illegal activity. There is no linking of arms,
4 there is no chanting in unison, there is no -- there is no
5 evidence, whatsoever. The most that the City says is that they
6 observe -- Monahan says that he observed pedestrians up the
7 block, cross from one side of the street to the other. Which
8 brings to mind, if I may inject a joke, the chicken crossing
9 the street. Who knows, there are a million answers to the
10 joke, there are a million answers to why people could have
11 crossed the street up the way, and it certainly does not
12 constitute evidence that the people who were on the sidewalk
13 were obstructing.

14 So the police had to know, not only were there media
15 there, because they were talking to them, they could see them.
16 We have given a number of videos made from the sidewalk by
17 people who were there as you see the march come across. So
18 they were on the sidewalk. There were pedestrians on that
19 sidewalk, completely uninvolved. You see them -- if you look
20 at the Judd, or Volpe, or Turner videos, you see someone, those
21 people with their video cameras, on the east side of Church
22 Street, on the Fulton sidewalk, and you see pedestrians
23 crossing the crosswalk walking onto the Fulton Street sidewalk.
24 You have the police talking to Mr. Hederman on videotape about
25 their concern that they not obstruct pedestrians. So they

1 certainly had in mind that there would be pedestrians on that
2 sidewalk when the march was stopped.

3 They, the defendants, do not describe any conduct that
4 would constitute obstructing the sidewalk. In addition to the
5 fact that you had other people, they do not describe any
6 activity that actually falls within New York law constituting
7 obstruction of the sidewalk.

8 Every single video shows a crowded, typical, New York
9 City sidewalk that pedestrians could pass by on. There is no
10 indication that it violates the clearly-established law under
11 New York Court of Appeals decisions under Jones vs. Parmily
12 regarding what constitutes obstructing the sidewalk. There is
13 not an iota of evidence that that sidewalk was ever obstructed
14 by anyone.

15 THE COURT: Well, one of the ground rules was, one or
16 two abreast before the thing started -- maybe you're going
17 there. And so -- so that was one of the ground rules. And
18 don't block intersections, you have to obey traffic lights,
19 correct?

20 MR. SPIEGEL: So let's assume -- I don't -- I don't
21 know that that exactly -- I don't think that took place, I
22 don't think that is what is shown --

23 THE COURT: What do you mean that that was what took
24 place, that was one of the conditions.

25 MR. SPIEGEL: No, I think the police are permitted to

1 set crowd control conditions. Can they summarily arrest an
2 entire group of 227 people because they claim they perceive
3 someone crossing the sidewalk, the crosswalk improperly?
4 Because they have set a condition that people walk two by two,
5 as they walk by a member of the media it looks like three,
6 let's assume that they are right, that it is three marchers.
7 Maybe they have probable cause at that point. I don't think
8 so --

9 THE COURT: Probable cause --

10 MR. SPIEGEL: -- but the argument would be to arrest
11 the individual, but not 227 people. It cannot be the basis for
12 arresting an entire group of people because they perceive that.

13 I think we get into a First Amendment problem when we
14 are -- which we're not here to address really today, we're here
15 to address the 4th Amendment problem, about a demonstration in
16 which you set such conditions. And then, without fair warning,
17 think you can start arresting people, anybody, without giving
18 them some kind of indication that the crowd control conditions
19 are not being met.

20 THE COURT: Right. And I'm not sure if you are going
21 to talk about the Seventh Circuit Vodak case or not, is that
22 one that you were going to touch on?

23 MR. SPIEGEL: Your Honor, I -- I don't think -- I
24 think that -- in terms of which aspect? In terms of the
25 permission to march?

1 THE COURT: Well, just in terms of the --

2 MR. SPIEGEL: I mean, there, you had the police
3 directing people down city streets. Here, we have people
4 walking on the sidewalk which we don't believe requires a
5 permit. In any event, the announcement fairly gave people
6 permission to walk.

7 With respect to -- I just don't think that -- that
8 there is any -- the problem we have on Fulton Street is there
9 is no underlying the illegal conduct. And, then, they can't
10 possibly have believed, reasonably believed that there were not
11 people who were not involved in the march, to the extent that
12 they consider them marchers, to have been some kind of group of
13 people would were not honoring conditions, they say.

14 Was there an issue regarding Vodak that you want --

15 THE COURT: I think it probably helps your position.

16 MR. SPIEGEL: I think it does, too, but the march in
17 Vodak, the police gave dispersal orders. It seemed to me that
18 was the underlying conduct that they found illegal. And that
19 the people -- that they then arrested a large number of people,
20 and the question was whether or not everybody could have
21 reasonably heard it. Here, I don't think that the dispersal
22 order really -- it's a sham what Monahan did on the street that
23 day. That was no dispersal order that anyone could have
24 possibly have responded to, and it's impossible that any group
25 of people, beyond the first few in front of him, could have

1 heard it.

2 Your Honor, I'm gonna let Mr. Moore address the 16th
3 Street facts at this time, unless you have any other questions.

4 THE COURT: No, I don't, actually, so.

5 16th Street seemed very, very different than Fulton
6 Street.

7 MR. MOORE: That's fair to say, Judge.

8 Judge, we represent the class in McNamara, so we have
9 plaintiffs in both locations. I just want to make sure the
10 Court understands we join in the arguments made by Mr. Dunn and
11 Mr. Spiegel.

12 THE COURT: No, these are divided up just for purposes
13 of today's hearing.

14 MR. MOORE: I think your comment about Vodak is
15 important, because I think Judge Posner pointed out that, and
16 he says: No precedent should be necessary to establish the
17 fourth Amendment meant does not permit the police to say to a
18 person, go ahead and march. And then five minutes later,
19 having revoked the permission for the march without notice to
20 anyone, arrest the person for having marched without police
21 permission.

22 And I think it's -- you could argue that that is
23 exactly what -- that is at least in part what happened at
24 Fulton Street. So just in terms of responding to your point
25 about Vodak.

1 I do want to address --

2 THE COURT: Maybe not five minutes, but --

3 MR. MOORE: Actually, it was shorter than five
4 minutes.

5 THE COURT: Seems to me about 90 seconds.

6 MR. MOORE: The point that Judge Posner is making in
7 Vodak applies to the full force of these cases.

8 It is true --

9 THE COURT: No, but the point Mr. Spiegel is making is
10 that there was -- he is suggesting there was no illegal
11 activity at Fulton. There is clearly some illegal activity on
12 East 16th, right --

13 MR. MOORE: Well --

14 THE COURT: You are not suggesting that --

15 MR. MOORE: That's --

16 THE COURT: -- anybody can just throw a parade on the
17 middle of a city street in mid day, right?

18 MR. MOORE: No, I'm not suggesting that.

19 I think 16th Street does present a different set of
20 facts for the Court to consider.

21 I still think that the issue is the same, whether the
22 facts would have been -- whether a reasonably prudent police
23 officer would have concluded, based upon what they saw at the
24 time they decided to arrest this group, that everybody in that
25 group was engaged in unlawful behavior. And I think if you --

1 you said you watched the videos, you read the submissions. I
2 don't think you can -- any reasonably prudent police officer
3 could conclude, having gone through that, seen those videos,
4 having witnessed on what happened on 16th Street, that
5 everybody being arrested was engaged in unlawful behavior. And
6 that's the important point.

7 Carr and Bernini, to the extent that they have any
8 applicability in the Second Circuit, carved out a very limited
9 exception to the Fourth Amendment requirement for
10 individualized probable cause.

11 There is, in fact, no principle that I don't think any
12 Court has ever endorsed of group probable cause. What Carr and
13 Bernini say, that under certain unique circumstances, you can
14 infer from what you are observing that everybody engaged in a
15 particular activity understands that it is unlawful activity.
16 And you just can't get that from looking at what happened at
17 16th Street.

18 And in the absence of that, in the absence of a
19 reasonable belief that everybody arrested on that evening on
20 16th Street was engaged in unlawful activity, you can't sustain
21 this probable cause theory based on group probable cause that
22 the defendants urge this Court to do. This case is simply not
23 Bernini or Carr. Those were unique factual situations that the
24 court dealt with. And I think if you look at what Judge
25 Silverman said in the rehearing decision in Carr, he said to

1 caution everybody: This is not the situation where you have an
2 undifferentiated mass of people who happened to be in proximity
3 to unlawful behavior. That would not sustain a theory of
4 arresting everybody. And that's --

5 THE COURT: Well, what he said, and it's really dicta,
6 but is that Carr does not permit the police to arrest
7 undifferentiated groups of marchers and bystanders, with no
8 effort to separate the two.

9 MR. MOORE: Right.

10 THE COURT: Now, there is some evidence, or some
11 evidence that there was an effort to separate the two. That
12 some officers were sent through the crowd to try to give
13 dispersal orders, and to tell people if they want to get out of
14 here, they better get out now. Not a lot of detail, not a lot
15 of flesh on those bones. But there is at least some evidence
16 in the record about that.

17 MR. MOORE: Let me say two things about that. First
18 of all, that would have come after Chief Essig had concluded
19 that he was going to arrest everybody on that street, who was
20 on that street who was inside the mesh. Because he concluded,
21 as he was going -- once he saw this group -- and he says this
22 at his deposition. He concluded, once he saw the group cross
23 Union Square East into 16th Street, that everybody was gonna be
24 arrested. So that's why he didn't give any orders to disperse
25 when he got on 16th Street. He says that in his deposition, he

1 is -- on page 744 -- which is a good reason why depositions
2 should go on for a long time. But he says: The people were
3 going to be arrested once they let Union Square and paraded
4 without permit.

5 That's what he says. And the question was: So there
6 would have been no reason to give them an order to disperse?

7 Answer: That is right.

8 So it's curious, I think, that the City now attempts
9 to defend the conduct of the police at 16th Street based upon
10 the effort that Johnson in Courtright made to try to determine
11 whether some people should be asked to be given information
12 that they could leave. It seems clear to me from having read
13 both those depositions -- and we have provided excerpts to the
14 Court -- that they were really concerned about the business
15 people, and closing the garage door -- there was a big garage
16 on 16th Street. That there was really no effort to, as there
17 was in Bernini, to determine whether in fact, bystanders, other
18 people who were simply on the sidewalk -- even if you are not a
19 bystander, if you are on a sidewalk not obstructing anything,
20 you have a First Amendment right to watch what is going on even
21 if it is going on on the street.

22 So you have seen the videos. I mean there are --
23 there are hundreds of people on the sidewalk. Yes, there are
24 people on the street. But the fact that the police arrested
25 everybody, does not --

1 THE COURT: I don't know that -- it's not clear from
2 the video the police arrested everybody. In fact, it is -- the
3 arresting that's going on is very hard to distinguish whether
4 some people are not arrested who were on the street and
5 watching, or having a cup of coffee.

6 MR. MOORE: That's my point, Judge. It's very hard to
7 tell where these people came from. So no reasonable police
8 officer would have been able to discern that at the time. You
9 can't tell whether the person you are arresting was simply
10 walking down the street, was a journalist, was a legal
11 observer, was a bystander, was somebody actually engaged in
12 First Amendment expression even if it was on the street, even
13 if it was not a permitted march. The fact that you can't
14 determine that, is fatal to the City's argument.

15 Notice and an opportunity to disperse which the Barem
16 Court, the Downs Court, Vodak, all stressed, and even Jones vs.
17 Parmily, is very important. I mean we would argue that given
18 the First Amendment activity, that you would, before you can
19 arrest for these violations, disorderly conduct, parade without
20 a permit, that you have to give notice. But even setting that
21 aside, notice was important on the issue of probable cause.
22 Because it would have given the police some belief that the
23 people who were there after notice and an opportunity to
24 disperse was given were, in fact, engaged in unlawful behavior.

25 Have I reached my 10 minutes?

1 THE COURT: No, you have a couple of more minutes.

2 MR. MOORE: Okay.

3 And that simply wasn't the case. If you look at
4 the -- if you look at the video -- and we provided sort of a
5 time-stamped compilation. The crowd left Union Square Park at
6 6:58. That is when the band started marching. At 7:01, they
7 were diverted onto 16th Street. At 7:02, the line closes at
8 16th Street by the police so that nobody -- I mean I'm not
9 saying some people didn't get out. But for all intents and
10 purposes that -- that police put a line across the street,
11 building to building, and not letting people out and not
12 letting people in. They did the same thing at Irving Place --

13 THE COURT: Well, the same thing happens in Bernini.
14 Basically, what happened in Bernini, was there was an attempt
15 to discern who had been part of the unit at the intersection
16 and who wasn't. So it was not an indiscriminate arrest, it was
17 there was an attempt to make some separation.

18 MR. MOORE: Well there's two things about Bernini.
19 First of all, the conduct here that was happening on 16th
20 Street was nothing close to what was happening at Bernini.

21 THE COURT: Well, if your loved one was waiting for
22 the ambulance to come, you might feel differently, right?

23 MR. MOORE: Well, there is no evidence --

24 THE COURT: Well, my point is that's what the police
25 are charged with, it's making sure that emergency vehicles and

1 others can get through. And a parade by -- staged by people
2 who didn't care about that -- I guess it depends on whose ox is
3 being gored. But if you are the one waiting for the ambulance,
4 you would be unhappy about the impromptu parade.

5 So I'm not sure that Bernini or Carr turn on the fact
6 that there were riots, or baseball bats, or torches in one
7 case, and merely a parade with xylophones and drums in the
8 other.

9 MR. MOORE: Right, not I understand that. And I think
10 that the point I'm trying to make is the police had a
11 legitimate interest in clearing the street so that people could
12 come by. And if you look at the videos, at least on Union
13 Square East the traffic was moving within you know, certainly
14 by 7:06 because certainly by 7:10, that's when arrests start.
15 So all of this took place in the course of 12 minutes. And
16 there is no doubt there -- and we don't take the position that
17 the police didn't have an interest in responding to what was
18 happening. The question becomes, having responded, having
19 dealt with the crowd control situation, having gotten the
20 people off the street onto the sidewalk -- and it's there in
21 the video. You see people coming back. They are coming back
22 on the sidewalks. And that's where they are arrested, on the
23 sidewalks. But having done that, then having trapped everybody
24 who was now cleared off the street in the sidewalks and
25 arresting everybody without regard to why they were there or

1 how they got there, is unreasonable under any definition of the
2 Fourth Amendment, that that decision is the one that violates
3 the Fourth Amendment. Because no reasonable police officer
4 would have, or could have, concluded that everybody who was
5 then trapped between those two orange mesh nets on either side
6 of 16th Street had engaged in unlawful behavior. And that's
7 why notice and an opportunity to disperse are critical in this
8 context. And, in fact, as we pointed out in our briefs, that's
9 how the police are trained, that's what Essig said his training
10 was, that you give notice and an opportunity to disperse. He
11 said he carried a card with the script for what you say to a
12 crowd when they are engaged in that kind of conduct. And in
13 fact, that is how the defending -- the Brooklyn Bridge arrests.
14 And we provided you with the brief of the City in that case
15 where 700 people marched onto the Brooklyn Bridge, clearly a
16 much more vital artery, traffic artery, than 16th Street
17 between Union Square East and Irving Place. And they defended
18 that case by saying we did it right; we gave notice, we gave an
19 opportunity to disperse, clearly heard by people. This
20 situation that the police were presented with at 16th Street
21 just did not give them the right to simply arrest everybody.

22 And so, on that basis, we would urge that the Court
23 grant summary judgment as to 16th Street.

24 Unless you have any other questions, I'll --

25 THE COURT: No, I'm good. I'm going to stop the clock

1 for you.

2 MR. MOORE: I do want to respond at the end to the no
3 summons issue, so I'll wait until that comes up.

4 THE COURT: Okay, so you folks have about, I think, 19
5 minutes left. Good.

6 All right, Mr. Farrell, you are going to carry the
7 ball on the first part, right?

8 MR. FARRELL: Yes, your Honor.

9 My plan is to address the issues, and if there is a
10 question that I think I need some assistance on, I will turn to
11 some of my colleagues at the table.

12 THE COURT: Okay.

13 MR. FARRELL: First thing I would say is that, in
14 terms of sending a message, which is what plaintiff's counsel
15 had asked this Court to do, I think that the message of the RNC
16 was -- the undisputed message was that 800,000 people
17 demonstrated without arrests. And only 1800 people were
18 arrested. On a percentage basis, that's less than point
19 2 percent of protestors or demonstrators who were arrested. So
20 I think that's the message that should be realized.

21 THE COURT: I'm not sure what I'm supposed to take
22 from that?

23 MR. FARRELL: Well, I'll --

24 THE COURT: What's a couple of percent, even if it was
25 wrongful?

1 MR. FARRELL: I think it's clear that the City was
2 facilitating First Amendment activity when it was lawful,
3 and --

4 THE COURT: Well, wait. Wait, wait. Look, I think
5 that any objective observer could say that, overall, the City
6 did a good job; nothing blew up and people were able to
7 protest. It was -- it came off okay. But that's not the
8 issue. The issue is, from that, I'm to presume that any arrest
9 they did make was an okay one, because they were -- they only
10 arrested 1800 out of 800,000?

11 MR. FARRELL: No, that's not what I'm asking the
12 Court --

13 THE COURT: Good. I didn't think you were. So but I
14 don't think that's an argument. That seems to be more designed
15 for press consumption.

16 So let's talk about the issues in this case. Because
17 I'm not really interested in sending messages, generally.
18 That's for politicians to do. My interest is just making sure
19 I get the law right, and that I can understand the facts.

20 MR. FARRELL: All right. Well, contrary to what
21 plaintiffs have argued here today, the law regarding when the
22 police -- when probable cause exists to arrest a group, was not
23 settled in 2004 during the RNC. All of the cases Carr,
24 Bernini, Papanow which they refer to as Jones v. Parmily, all
25 were decided after 2004. That's the first issue.

1 The second issue is that Carr and Bernini made clear
2 that when a group is acting as a cohesive unit, it can be
3 arrested as a unit and that probable cause can exist.

4 The second thing is that Carr and Bernini made clear
5 that violence is not a prerequisite to making an arrest of a
6 group. Specifically, Carr states in addressing the legal
7 standard, that groups can be arrested when they are engaged in
8 violence or obstruction. That language is explicitly in Carr,
9 it goes back to Washington Mobilization v. Culnaine, which is
10 DC Circuit case. And the facts in Bernini were -- not only
11 were the individuals there subject to violence, but they also
12 were being charged with unlawful assembly. And in Minnesota,
13 that statute does not require violence, it only requires,
14 quote: That the participants so conduct themselves in a
15 disorderly manner as to disturb or threaten the public.

16 So the first three premises that violence is required
17 to make a group arrest is contrary to the established case law
18 in Carr and Bernini --

19 THE COURT: I agree with you on that, so what are the
20 other two; the other two points you were making?

21 MR. FARRELL: That you can arrest a cohesive group as
22 a unit --

23 THE COURT: If you have a reasonable belief that
24 everybody you arrest is part of that unit and is engaged in
25 unlawful activity, right? It can't just be that there is a

1 group here, they are all wearing red shirts and they are
2 engaged in obstructive behavior, so we're taking out the whole
3 block, including everybody who is wearing a blue shirt and a
4 striped shirt, right?

5 MR. FARRELL: That's not what I am suggesting, your
6 Honor.

7 What I'm suggesting is that the case law, Carr and
8 Bernini, made clear that when the group is acting as cohesive
9 unit and the group as a whole is engaging in either a parade,
10 without a permit, or an obstruction of pedestrian vehicle
11 traffic, that there is probable cause exists to arrest that
12 group or, at a minimum, the officers would be entitled to
13 qualified immunity as the Court found in Bernini.

14 THE COURT: All right, but here's the situation.
15 Let's use a hypo and come back for actual.

16 So you've got a group determined to obstruct traffic,
17 and conducting impromptu, unpermitted parade on Broadway, right
18 through Times Square. There is 200 of them and that's what
19 they are doing. You are not suggesting that you can then just
20 cordon off the block and arrest all 500 people who happen to be
21 on that street because it's 5:00 p.m. on a Thursday in the
22 middle of Times Square. You are not suggesting that, right?

23 MR. FARRELL: No. We're not suggesting that, your
24 Honor. In fact, the example that your Honor gives, is the
25 cases where the correspondent is not is not a cohesive unit.

1 That would be an example --

2 THE COURT: No, it's a very cohesive unit.

3 MR. FARRELL: No, it's --

4 THE COURT: Clearly, cohesive unit is the people who
5 are obstructing traffic. The issue is whether the police have
6 done enough to make sure they are only arresting the cohesive
7 unit and not everybody else who happens to be in the vicinity.

8 MR. FARRELL: I agree with you, your Honor. I think
9 it's a two-step process. One is I think you need to identify a
10 cohesive unit, that there is a cohesive unit. And the second
11 step is to ensure that you reasonably believe that the people
12 you place under arrest were part of the cohesive unit and not
13 some other people who were in the vicinity. I think that is
14 the two-step process that the case law discusses. And at both
15 locations, at Church and Fulton, and at 16th Street, the City
16 and the individual defendants satisfy those requirements.

17 THE COURT: How so? Let's talk about Fulton Street.

18 MR. FARRELL: All right. And I just want to state
19 that this is framework that we're discussing about the facts
20 and about the law, is we've moved for probable cause -- there
21 was probable cause existed to grant summary judgment. Or that
22 there was -- that we are entitled to qualified immunity, which
23 means either the law was not clearly established or that there
24 was arguable probable cause. So the discussion we are about to
25 have about the facts and the law, I'm going to do in addressing

1 both of our parts of our summary judgment motion.

2 THE COURT: Okay, that's fine. But I do think you
3 have to be very careful not to say that because Carr and
4 Bernini had not been written yet, that it was reasonable to
5 believe that if you have a couple of hundred people who you
6 think are violating the law, you get to sweep up 500 because
7 they are nearby.

8 MR. FARRELL: Again, that's not what I'm suggesting.

9 The question is what were the parameters of when you
10 can make a group arrest, were they clearly established at the
11 time.

12 Before I go into the facts, I would like to address
13 one other point that one of my adversaries made, and that had
14 to do with this issue of, you know, they argue that what was
15 clearly established was that you needed individualized probable
16 cause. That's not what we are here to discuss and that's not
17 what we are saying.

18 What we believe the qualified immunity test is going
19 to is when you can make an arrest of a group. Not whether you
20 need individualized probable cause. Nobody disputes that,
21 quote, you need probable cause to arrest individuals. The
22 question is, when you have a group setting and you have the
23 practical realities faced by police officers dealing with
24 disorderly groups, large -- large number of people, under what
25 circumstances does the Police Department have probable cause to

1 make the arrest. And that is the question that it was not
2 settled. And the qualified immunity law clearly states, you
3 don't deal with generalities -- generalisms, I guess I'll say,
4 since I can't get the word out -- that you need probable cause
5 to arrest. Nobody disputes they need probable cause to arrest.
6 It's the more specific question and the qualified immunity case
7 law says the more specific question of under these
8 circumstances when you have a large disorderly group, when can
9 you make the arrest. That is the question, not the way it was
10 defined by my adversary.

11 THE COURT: Wait a minute. I mean I think the issue
12 is if it was clear to a reasonable officer that we are making
13 an arrest here and we're going to clear this street, but we're
14 gonna have a lot of tuna and we have a lot of dolphins in the
15 same net, but we'll sort that out later when we get them to
16 Pier 57. You are suggesting that that was a reasonable, and
17 that was a qualified immunity-able position --

18 MR. FARRELL: No, your Honor.

19 THE COURT: -- in 2004?

20 MR. FARRELL: I'm not -- the City's position in this
21 case is not that they swept up a large undifferentiated group
22 and brought them to Pier 57. The City's position, and I will
23 go through the facts to show you, that at both locations, it
24 perceived a cohesive unit that was engaged in a parade. If
25 there is anything that's cohesive, that is an easily cohesive

1 identifiable unit, that is a parade, that certainly I would
2 think is more identifiable as a cohesive unit, everyone's
3 travelling in the same direction, marching together --

4 THE COURT: You've got media folks who are aside them,
5 people walking parallel with them because it is an open
6 roadway, or it's a thoroughfare, and you have some people who
7 are just watching. You are saying you get to arrest all of
8 those folks, too?

9 MR. FARRELL: What I'm saying is that someone's status
10 as a legal observer as media or something else, if they are
11 engaging in the unlawful conduct, and the police observe that
12 person engaging in it, their status as a media or legal
13 observer doesn't change the analysis. In fact, in Bernini, the
14 Eighth Circuit specifically said, hey, we know that plaintiffs
15 here claim they were held in the status of legal observer or
16 media or some other title, but that doesn't change the
17 reasonableness of the officers' perception that they were all
18 engaged in unlawful conduct. That the explicit language found
19 in Bernini, they say that the title of legal observers and
20 media do not change it.

21 And I will also say at both of these locations, that
22 the police took reasonable steps, once the groups were cordoned
23 off, to make sure that they only had the individuals who they
24 perceived were engaging in unlawful conduct.

25 So I'm going to go into that. And I would just like

1 to draw the Court's attention, before I do that, to the Carr
2 case when it comes to this issue of the personal knowledge
3 orders that were referenced earlier. Carr, I'm quoting from
4 Carr, it says: The officer need not keep everyone individually
5 in the crowd. Police witnesses must only be able to form a
6 reasonable belief that the entire crowd is acting as a unit
7 and, therefore, all members of the crowd violated the law.

8 THE COURT: Right.

9 MR. FARRELL: So it's that -- the DC Circuit disagrees
10 with plaintiff counsel's argument --

11 THE COURT: I'm not sure. Are you saying, are you
12 disagreeing with that characterization? I think the issue is
13 whether or not you've got folks at sidewalk cafes that are
14 subject to the same arrest order as the people who are marching
15 in the street and on the sidewalk.

16 MR. FARRELL: All right. Well, if plaintiffs are
17 conceding that that's their argument, then I'll move past it,
18 and go to the fact to show why people, it was reasonable for
19 the officers at two locations to believe that they had in fact
20 arrested the unlawful group.

21 All right, so the first question, as we agreed upon,
22 is whether these two groups could be perceived as cohesive
23 units, versus an undifferentiated group. The undifferentiated
24 group is the type of group that is in the Barrow case, DC case
25 where there were people in a park, outside the park, there had

1 been a couple of people engaged in unlawful conduct. They
2 then, the police observed that unlawful conduct of those
3 individuals, those individuals then came into the park and the
4 police then observed the park for an hour after that and
5 watched other people come and go and intermingle and comingle
6 with that group. That is an instance where you have an
7 undifferentiated group.

8 At Church and Fulton, the facts that support treating
9 this as a cohesive unit, were that this was a march organized
10 by the War Resistance League. These are all undisputed facts,
11 that the NYPD discussed the march before it began with the War
12 Resistance League's -- a person who was organizing it, Ed
13 Hederman, who is a plaintiff in these cases. Hederman tells
14 the NYPD, and it's in the videotapes, on the videotapes, that
15 the group will follow the directives that they had been given,
16 and that he has designated either marshals or peacekeepers who
17 will make sure the group does so.

18 So you have the War Resistance League there. They
19 sent out, put a notice out, said: Hey, come down to Church and
20 Fulton, we're gonna have an unpermitted march. Flier said it
21 was unpermitted, they had no permit for it. Several hundred
22 people show up. This is on Tuesday afternoon at 4:00, during
23 rush hour. And, now, the police are there speaking with them.
24 The police offer the War Resistance League an alternative route
25 up Church Street, because it goes with the flow of traffic.

1 The War Resistance League rejects that offer. The War
2 Resistance League tells Galati, no, I do not want to go that
3 way. I want to go up, northbound, on Broadway. Police say:
4 Hey, if you are going to do that, we can't sanction it, you'll
5 be subject to arrest if you violate the rules.

6 He says: Fine, we'll take care of it, I have people,
7 we'll follow the rules.

8 Galati tells Hederman what the rules are. You have to
9 be single file or double file; you can't cross against the
10 traffic lights; you can't block vehicles or pedestrian traffic;
11 and you can't turn that banner that you plan on having in the
12 front of the march horizontally to block the sidewalk. He
13 says: Fine, we agree to that, and we'll make sure that that
14 happens.

15 Then the NYPD says makes an announcement to the group.
16 Chief Galati, over the bullhorn, makes an announcement, warns
17 the crowd that these are the three or four things that you need
18 to do and specifically tells them: Otherwise, you will be
19 subject to arrest. I must warn you, you will be subject to
20 arrest if you violate these rules.

21 THE COURT: Right. But there is some question as to
22 whether everybody heard this. In fact, on some of the
23 videotapes, you can loudly hear people saying: Can't hear you,
24 so --

25 MR. FARRELL: You hear that on some of the videotapes.

1 The question is whether it was reasonable for the NYPD to
2 believe that everybody had heard these warnings. And, in fact,
3 Chief Galati orders one person to go through the back of the
4 crowd, over a bullhorn, and make the announcements a second
5 time, which happens, and is captured on the videotapes
6 submitted to the Court.

7 In addition, he sends a different officer down the
8 line of the crowd to make oral announcements about the
9 conditions. The fourth thing that happens is once the crowd
10 starts to cross the street, there is an officer standing there
11 with the bullhorn warning the group that if they violate the
12 law, they are going to be subject to arrest.

13 THE COURT: No, he didn't say you are all going to be
14 arrested if one of you gets out of line, right? Nor could he,
15 do you think? That wouldn't be reasonable, would it?

16 MR. FARRELL: No, but what this is indicative of is
17 that from the Police Department's viewpoint, that it was
18 reasonable for them to believe the group that had been there to
19 assemble to engage in a march, understood the warnings,
20 understood that if they violated the law that they were going
21 to be subject to an arrest, and that they were gonna proceed
22 under that -- within that framework.

23 THE COURT: No, but I think to arrest them all, you
24 have to be able to reasonably believe that they all intended to
25 violate the law, right? If everybody crosses the street with

1 the light, and there is 12 stragglers who cross against the
2 light in violation of, obviously, the local law, those 12 can
3 be arrested. But you're suggesting you can arrest everybody
4 because of the 12 who crossed against the light?

5 MR. FARRELL: I'm not saying that. I'm saying whether
6 it was reasonable for the police officers to view that that
7 march was in violation of the law as a unit.

8 The other thing that they warned them of was that
9 there was no permit for that march. And they said you do not
10 have a permit for this march, it is an unpermitted march.

11 THE COURT: Right. Again, they are on the sidewalk,
12 proceeding two by two. And so you are saying they needed a
13 permit for that?

14 MR. FARRELL: Well, that's -- the separate legal part
15 is what you need a permit on the sidewalk. And we would --

16 THE COURT: Two by two on the sidewalk, you are saying
17 you still need a permit?

18 MR. FARRELL: I'm saying that under the Section 10-110
19 of the Administrative Code, if a police officer perceived that
20 that's a parade, a procession, or a race, yes you do. You do.
21 That's what that statute says.

22 THE COURT: But police here clearly said you can march
23 by two by two, right?

24 MR. FARRELL: They said if you -- you have to march
25 single file, or two by two. So I mean they were making -- in

1 essence, the police were trying to make an effort to say, hey,
2 you want to go, you can try and go, but you are subject to
3 arrest if you don't do these things. And they told them you
4 don't have a permit, once the group as unit didn't do those
5 things, they were subject to arrest for all the statutes --

6 THE COURT: All of the people were subject to arrest,
7 once one person --

8 MR. FARRELL: And the reason is the video --

9 THE COURT: -- people cross --

10 MR. FARRELL: If you look at the videotape, from the
11 time that the march steps off, they violate all of the rules.
12 The march starts, the minute they step off the curb to cross
13 Church Street, nobody is single file or two abreast. You see
14 on the videotape a mass of people proceeding across Church --

15 THE COURT: I disagree with that, I watched it. I
16 disagree. What you do have is a lot of media people walking
17 alongside them. Your view is the media people were marching as
18 part of the parade, part of the group?

19 MR. FARRELL: The police officers are not
20 differentiating who is there participating.

21 THE COURT: Wait a minute. You just said the first
22 issue is whether or not this is a group that is working
23 collectively, right? So the media people are taking pictures
24 of people who are walking two by two. You are saying that the
25 police officer then has a reasonable belief that the entire

1 group is violating the law?

2 MR. FARRELL: If I -- when you say media, if I show up
3 with a camera and I'm participating in the march, I mean,
4 who -- who are be discussing is media?

5 THE COURT: Press credentials.

6 MR. FARRELL: Right. If you have press credentials --

7 THE COURT: Lou Young, if you want to ask him, he was
8 standing next to people who were walking two by two. You are
9 saying he was part of the group and, therefore, his violation
10 of the guidelines set by officer -- by Inspector Galati
11 subjected the entire group to an arrest?

12 MR. FARRELL: No.

13 THE COURT: No. Okay.

14 MR. FARRELL: Press credentialed people were in fact,
15 the testimony shows, Monahan testified, there's no dispute over
16 it -- were let out of the group once it was stopped.

17 THE COURT: That's a different issue. I'm talking
18 about the issue as to whether they could engage in acts that
19 would constitute the violation that you think was enough to
20 prompt the arrest of everybody.

21 MR. FARRELL: I think the Eighth Circuit recognizes
22 that, you know, from -- police officers, they don't -- if the
23 police don't recognize they're media -- or, again, if they are
24 violating the law, participating in unlawful conduct, I don't
25 think there is an exception. But I think the Bernini Court

1 said when the Police Department is looking at a group of -- in
2 Bernini, it was two to 400 people, depending on what point you
3 wanted to look at it. The Court said 10 people, media or legal
4 observers had been arrested as part of that group, does that
5 change the analysis? And the Court says, no, it does not
6 change the reasonableness of it.

7 In Bernini, what happened, was you had, across from
8 the -- the City of St. Paul, the Police Department was trying
9 to keep this group out from entering the City. There were a
10 group of 50 people across from them on the sidewalk. And the
11 Court says -- this is on videotape. Fifty people across on the
12 sidewalk. Next to that group, there was approximately 50 more
13 people. Fifteen people within the center group step out into
14 the street and challenge the police. They are driven back into
15 the main group. At that point, the police are outnumbered, so
16 they drive the group west. As the group heads west, it
17 increases in size to the point where they finally march it a
18 half mile away, and they turn it into a park. The police then
19 detain everybody in the park, 400 people. It's undisputed in
20 Bernini -- that there were a hundred people down where the
21 unlawful conduct was observed. That was with that unlawful
22 conduct that the group was going to be placed under arrest.
23 The group then marched a half mile, went into a park. Now, the
24 group is up to 400 people. The police then make an effort to
25 sort through who entered the group during the march westbound

1 and who also was in the park, versus the people that they
2 believed were part of the group that had been across from them
3 down at the main intersection. They do that sorting process.
4 They then arrest a 160 people; 160 people, they arrest. The
5 Court says, undisputed fact show when you go to the videotape,
6 there were only a hundred people across from them when they --
7 at the time the unlawful conduct took place. So in Bernini,
8 they arrested 50 percent more people than were present when the
9 unlawful conduct took place. And the Court says on those
10 circumstances, because the officer's viewpoint that he couldn't
11 see the depth and size of the crowd, it was still reasonable
12 under those circumstances for the arrest of a 160 people. And
13 what I am saying to you is, at Church and Fulton, by
14 plaintiff's own admissions, every single one of those people
15 was there to engage in a march. This was not an instance where
16 you have a hundred of those people saying, hey, you know what,
17 I wasn't there for the march. We went through all of the
18 testimony, including our declaration, and we have identified
19 only three people out of 221 who claim they were not there to
20 participate in the march.

21 THE COURT: I don't think that's the issue.
22 Participating in a march is not unlawful, per se. It's --
23 right?

24 MR. FARRELL: No, the march turns to be unlawful
25 because --

1 THE COURT: Because why?

2 MR. FARRELL: The group, as a unit, did not follow the
3 warnings that the Police Department had given them.

4 THE COURT: The group, as a unit? You can hear on the
5 tape some people in the march saying don't block the roadway to
6 other people who are following. So that clearly, the intent,
7 the collective intent was not to violate the local traffic law.

8 MR. FARRELL: The intent from the police officer's
9 perspective is what is at issue. It wasn't reasonable for the
10 police officers to believe, could they infer from the conduct
11 of the group that this group intended on violating the
12 disorderly conduct statute. I would also say that the parading
13 statute doesn't have an intent requirement. The parading
14 statute in New York, Section 10-110, when you read it on its
15 face is a strict liability statute. Since --

16 THE COURT: Wait. The police told them they could do
17 this, they told them the ground rules. You can't just then say
18 I don't really like the way -- I don't like the rules I made,
19 so I'm now going to just stop it, you are all under arrest for
20 illegal parade, can you?

21 MR. FARRELL: I would agree with you. If they had
22 said, go ahead march. That's what happened in Vodak. You
23 raised Vodak before?

24 THE COURT: Yes.

25 MR. FARRELL: There, that was typical parade route.

1 Church and Fulton was not a parade route. Union Square and
2 16th Street was not a parade route. There is no such thing as
3 that in New York, Maybe 5th Avenue, perhaps, not there. In
4 Vodak, it was a typical parade route. Police said to them
5 nothing. They said go ahead. They didn't warn them, they
6 didn't say they had to do anything. Didn't tell them they
7 would be subject to arrest. The Court in Vodak said in that
8 instance, that's like entrapment. That is very different than
9 what happened at Church and Fulton Street. Because at Church
10 Fulton Streets, they told the group ahead of time, you do not
11 have a permit for this march.

12 Listen, I like to run. If I showed up with 150 or 300
13 of my people I like to run with, and I want to have a race up
14 5th Avenue and the cops say you have to follow the rules, and I
15 say, okay, I'm going to do all of that, and I know I'm
16 surrounded by 200 other people, I'm basically assuming the risk
17 that if this unit that I'm involved in breaks the law as a
18 group, we take over the roadway, yeah, I am subject to arrest,
19 the cops just told me I was subject to arrest. I think that is
20 vastly different than the facts that were set forth in Vodak.

21 THE COURT: So what are the violations, then? That
22 you are referring to. So, more than two arrests? That's what
23 you are saying the evidence reveals?

24 MR. FARRELL: There were more than two arrests. The
25 videos show they didn't cross with the traffic light. There is

1 a -- the video shows they turned the banner to block the
2 sidewalk, they didn't keep it vertically as they said they were
3 going to. They turned it horizontally. And they block the
4 entire sidewalk.

5 THE COURT: The entire sidewalk is blocked because
6 Monahan loses his head, stops the thing, and then doesn't let
7 anybody go forward, while the folks in the back keep moving
8 forward. That's pretty obvious. I just think if you are going
9 to insist that it was magnificent police work the whole way, I
10 just think you are going to run up against facts that are
11 difficult to square. I mean the rest of the cops looked
12 utterly confused as to why Monahan is going nuts.

13 You disagree with that?

14 MR. FARRELL: What I --

15 THE COURT: They have gone half a block when he shut
16 the whole thing down.

17 MR. FARRELL: And you know what the testimony of the
18 marchers were, some of the admissions we got in deposition?
19 Nine plaintiffs admitted at deposition that it would have been
20 difficult for anyone to walk against the flow of the marchers
21 that day.

22 Another plaintiff, Jeffrey --

23 THE COURT: But, again, if the cops told them they can
24 do this, two abreast, you can't change the rules in mid march,
25 can you?

1 MR. FARRELL: No. But they were not two abreast.
2 Your Honor, if that videotape showed people processing two
3 abreast in an orderly fashion, I agree with you. But the video
4 demonstrates they were four, five, six abreast, they were
5 flowing up the entire sidewalk. That's what the video shows.
6 And the plaintiff's submissions admit that.

7 Jeffery Cohen, a plaintiff, testified that he was,
8 quote, swallowed up by the marchers. He was one of the three
9 out the 220 that said he came into the march. He wasn't there
10 to participate, he was trying to walk up the sidewalk. He was
11 swallowed up by the marchers and tried to cross the south side
12 over Fulton Street because he felt claustrophobic. Another,
13 Catherine recalls being engulfed, making it difficult to walk
14 on the sidewalk --

15 THE COURT: Before or after the order to stop the
16 parade and everybody from behind then moved out.

17 MR. FARRELL: Before, your Honor.

18 THE COURT: The testimony reflects it was before?

19 MR. FARRELL: Before. They said they were swallowed
20 up. And then when they were trying to work their way out, they
21 couldn't get out, and then they were placed under arrest.

22 Those were admissions cited in our briefs and in our
23 papers.

24 THE COURT: Well, obviously, the parade was stopped
25 before people were put under arrest, right? The front of the

1 parade, the front of the march was stopped before anybody got
2 arrested at that point. I mean Chief Monahan basically said
3 stop, stop it right there. They put bicycles in front of the
4 leaders, and then stopped everybody from moving. But what
5 happened in the interim was that the folks in the back of the
6 line kept moving forward. So certainly by that point they were
7 more than two abreast.

8 MR. FARRELL: If they had all been single file, two
9 abreast, and then they get stopped and that causes them to not
10 be single file, two abreast, I would agree with you. But the
11 video shows as soon as that group started across the street and
12 on the sidewalk, they were taking over the whole sidewalk and
13 we have plaintiffs' admissions in the video to show that.

14 I would like to move to 16th Street. I think that,
15 there, it is also undisputed that that group was acting as a
16 cohesive unit. There was no permit there. The plaintiffs
17 admitted that they knew it was --

18 THE COURT: It was a cohesive unit at 16th Street.
19 The issue is did the arrest, and the order to arrest, involve
20 what a reasonable officer would have recognized to be those who
21 were engaged in the collective action and a lot of other
22 bystanders. And so there are people on the sidewalk, people
23 just walking trying to get to where they are going, and some
24 people just having a drink at a sidewalk cafe. That's clearly
25 on the video, right?

1 MR. FARRELL: Yes, but those people were not arrested.
2 There is no plaintiff here in this room, or in any of the
3 papers, out of all of the people that are suing at 16th Street
4 that says I was arrested for sitting at a cafe. No one. Not a
5 single person. So, yes, does the video show there were people
6 on there? Yes. But the fact that they are not part of the
7 plaintiff shows that the Police Department's efforts to make
8 sure they only arrested the people that had engaged in the
9 unlawful conduct were successful, at least reasonably
10 successful. Again, the litmus test here is not that we have to
11 show a criminal conviction beyond a reasonable doubt. We just
12 have to show a probability of criminality by the people that
13 were placed under arrest. We're not dealing with criminal
14 conviction. And your point that, yes, the video shows
15 people --

16 THE COURT: One of the things that is good about
17 having these, is I get to eventually ask a question or two. So
18 you just can't run right over me. You can't do that.

19 MR. FARRELL: I don't mean to do that, your Honor.
20 I'm just cognizant of the time and the several points I'm
21 trying to make.

22 THE COURT: All right. But my questions count against
23 your time, that's just life.

24 So the point I'm trying to make is that there are all
25 these people on the street. The record seems pretty silent,

1 actually, as to what efforts were done, as was done in Bernini,
2 to cull through and segregate those who were part of the
3 collective action and those weren't. I don't know why the
4 record is so silent on that, but it's pretty silent.

5 Couple of cops were sent through, not clear how long
6 they were given, not clear what exactly they were directed to
7 do or what instructions they were giving. It is kind of --

8 MR. FARRELL: I don't -- well, I would disagree with
9 your Honor. I don't think the record is silent. I think the
10 record is clear.

11 THE COURT: Tell me what the record says.

12 MR. FARRELL: All right. Well, at 16th Street, police
13 lines were formed at both ends of 16th Street. The parade
14 comes out of the park, it processes north on Union Square East,
15 turns up to 16th Street, it heads east. At the point, Essig
16 runs down along the group, runs down 16th Street, gets a couple
17 cops at the far end of that block that are in place, forms a
18 police line, the group keeps marching until it reaches that
19 police line, where it stops.

20 THE COURT: Right.

21 MR. FARRELL: At that point, a line that had prevented
22 the group from going, continuing north up on Union Square East,
23 there is about -- you know, cops, fold in behind the group, and
24 seal off 16th Street at Union Square East.

25 THE COURT: Right.

1 MR. FARRELL: That is depicted on the videotape.

2 THE COURT: So what is the process designed, as in
3 Bernini, to separate out the bystanders from the collective
4 activists?

5 MR. FARRELL: Right.

6 Chief Essig dispatches two lieutenants, Johnson and
7 Courtright to identify people who were not part of the group.

8 THE COURT: What were the criteria they were to use in
9 identifying those people; anybody who was shaven didn't count?
10 Or what? I don't understand. What were the criteria?

11 MR. FARRELL: Well, the criteria weren't identified in
12 Bernini as to what they did.

13 THE COURT: No, they were not. That's a flaw of
14 Bernini, that it doesn't give much guidance. It sort of states
15 conclusorily, well, 200 people were let go, 160 were kept.
16 Here, I don't think I have those numbers at all. Not clear how
17 many were let go or how many were kept. And it's certainly not
18 clear what criteria the officers were given to decide who was a
19 dolphin and who was a tuna.

20 MR. FARRELL: The officers were there, they were
21 trained police officers. They had witnessed the crowd --

22 THE COURT: Look, no one has greater respect for
23 police officers than I do. And I know it is a tough job, and I
24 know these were very difficult circumstances. But what exactly
25 were those two officers supposed to do to determine who was a

1 parader and who was a bystander.

2 MR. FARRELL: They were going up and down the block
3 telling people that if they were not part of the group, they
4 should go back into their businesses, go back into their
5 apartments, or they should leave the house.

6 THE COURT: Leave the house?

7 MR. FARRELL: The block.

8 Specifically, I believe it was -- I believe it was
9 Captain Johnson. There was a videotape that was submitted as
10 part of our submissions. It's Chapter 6 of defendant's
11 videotape submissions at 16th Street. At minute 7:02 to the
12 end, where a videographer on the street, approaching -- Captain
13 Johnson is coming down there, right from the camera. And the
14 person says how can I leave the block, how can I leave the
15 block.

16 On the videotape, Captain Johnson says to him just go
17 down to the end and exit at the end of the block. Which the
18 videographer then leaves the camera on, proceeds down to the
19 Union Square East end of block where you see on that videotape
20 the line of police officers standing, facing out towards Union
21 Square Park. They are across this way. The block is behind
22 them. They are keeping people out. His videotape captures
23 them saying, no, you can't come in here.

24 So the first thing that videotape demonstrates police
25 officers were making efforts to keep people from wandering into

1 the block.

2 The second thing it shows, he continues to film -- and
3 you can see people, dozens and dozens of people, leaving the
4 block through the police line. They are walking right out
5 through the police line, through the line of police officers.
6 Nobody is stopping him. He videorecords this. He, then, is
7 standing there. He, himself, steps through and goes right out
8 through the sidewalk and leaves the block.

9 This is all captured on video. So you have a
10 videotape which captures the instruction of a police officer
11 saying you want to leave the block you go this way. So that
12 demonstrates two things; one, that Captain Johnson and
13 Courtright were, in fact, going down the block and trying to
14 sort through who was there committing unlawful conduct and who
15 wasn't; and two, it shows that even if you had been engaged in
16 the unlawful conduct, that you were permitted to leave the
17 block. Because Captain Johnson says on that videotape, which
18 is -- Captain says, quote: If you want to break off from the
19 group and go back, he says, you may do so on the sidewalk.

20 So that that's the steps that were taken to make it
21 reasonable that Chief Essig and Inspector Dykman believed that
22 the people they had left on that block after those efforts were
23 taken, were the ones who had been engaged in unlawful conduct
24 and were demonstrating an intent to continue to do so. If you
25 look at every video that's been submitted -- and there is

1 dozens of videos -- you don't see anybody on those videos
2 saying, oh, how do I get, out where do I go, oh, I'm stuck on
3 here.

4 THE COURT: Well there are certainly some people who
5 are saying that, right?

6 MR. FARRELL: Not on the videos, they're not. The
7 only person on the video --

8 THE COURT: Wait.

9 MR. FARRELL: I'm sorry, I apologize.

10 THE COURT: We're not limited to what is on the
11 videos, right? There have to be no disputes of material fact
12 for me to grant your motion. So there are certainly people who
13 are saying, I tried to get out and I couldn't get out, right?

14 MR. FARRELL: But under Scott v. Harris, when you have
15 videotape that shows what happened, you have people that said
16 they did that, but the videotape overwhelmingly shows that over
17 the hundreds of people that those videotapes capture, nobody is
18 asking where do I go, and what do I do. And what those
19 videotapes shows are people dancing, singing, and covering the
20 cameras, whether it's a Taru camera, a police department
21 camera --

22 THE COURT: Clearly probable cause to arrest a lot of
23 people. The issue is whether it was reasonable to conclude
24 that everybody on the street at the time of the arrest was part
25 of this unlawful assemblage, this unlawful parade. And that's

1 the issue. And so in Bernini and Carr, there are efforts, you
2 know defined or not well defined, about trying to cull through
3 who is a part of the group and who is not a part of the group.
4 And it's less clear to me here what the criteria were. Some
5 people clearly are able to leave at certain points in the
6 video. It's not clear exactly -- it's hard to I think discern
7 from the video too, at who what point arrest decisions are
8 being made and how much time people were given to disperse.

9 MR. FARRELL: If you look at the videos, your Honor,
10 that I just quoted and the ones that were submitted, you see
11 there is ample time where the video captures people walking
12 out, dozens and he dozens of people walking through the police
13 lines. And I think that the effort that was made there is it
14 wasn't a case where the police just said everybody on 16th
15 Street, we're arresting everybody. They did the same thing
16 that the Court in the Eighth Circuit in Bernini found was
17 reasonable. They made an effort to discern who was part of the
18 unlawful group and who wasn't.

19 THE COURT: But what did they do to discern. That is
20 not -- I keep coming back to this. So what was the criteria
21 for allowing people to leave or not allowing people to leave?

22 MR. FARRELL: You have people who are easily
23 identifiable as having part of the march. Two bands in uniform
24 with instruments that had led the march. You had people who
25 were carrying a banner; some of them got out and perhaps some

1 of them didn't. You had people that were in the street, in
2 front of -- when the group came up to 16th Street at the Irving
3 Place, the police line was formed, the group stops, people put
4 bandannas on, they sit down. The people behind them continued
5 to sing, dance, and chant. And they start chanting: Whose
6 streets, our streets; whose streets, our streets.

7 The cops are there observing this. This is not a case
8 where the cops chased them onto some other block. They see who
9 it is. They are there. They then cordon that group off, after
10 allowing the time for the people that wanted to leave.

11 THE COURT: How much time was allowed for them to
12 leave?

13 MR. FARRELL: The testimony by Chief Essig I think is
14 between 10 and 15 minutes before the block was sealed off.

15 And I'll say this, that the -- the --

16 THE COURT: That's undisputed? I mean, look --

17 MR. FARRELL: There is no --

18 THE COURT: -- there are certainly witnesses that said
19 that they were not afforded, an they did not hear a dispersal
20 order and didn't have sufficient time to get away, right? You
21 may disagree with whether that is true, but there is certainly
22 people saying that, right?

23 MR. FARRELL: I think it's undisputed when you look at
24 the videotape. The videotape shows that the person came up and
25 said where can I get out and he says, yeah, go down to the end

1 of block, walk down the sidewalk and exit, and this guy does it
2 with his video camera and captures dozens of other people doing
3 it. I think this demonstrate there was ample time to proceed
4 from one of side of the block to the other, and exit through
5 the line of police officers. I think it is undisputed. You
6 can have somebody says, oh, I didn't have enough time, but the
7 videotape shows that you did have enough time.

8 And the last point I would add to this issue is, in
9 Carr, plaintiffs in that case, in Carr, DC case, moved for a
10 rehearing. And on rehearing, the Court said, raised another
11 issue and said can you arrest people who did not violate late
12 the law. That was part of what Carr said. Specifically, in
13 the first time the District Court said, quote -- Carr says: To
14 be sure under the standard of our cases, the police are obliged
15 to show that the crowd acted unlawfully as a unit. It is
16 possible that an entirely innocent person would be mistaken for
17 a rioter, but the standard is probable cause, not certitude.

18 So under the circumstances and the facts that are
19 undisputed, I think it compels the conclusion that the police
20 made reasonable efforts to believe that people they placed
21 under arrest were the ones who were engaged in unlawful conduct
22 on that block. And the fact that someone may be, and you don't
23 have a lot of plaintiffs who claim that. In fact, most say
24 they were there and had been walking along as part of the march
25 as part of the march or observing the march. So you had a

1 crowd of people who all processing together, very small number
2 of people who say, oh, I came from a different way.

3 Mr. Dunn's client, Dinler, no, he said that is the
4 typical plaintiff at that location. That's not the typical
5 plaintiff at that location. That's one of the very few
6 plaintiffs who claim they came in from a different direction.
7 I think only two plaintiffs in total, out of several hundred
8 that claim they came in from the eastern side of the block
9 versus the western side of the block. So that's the standard
10 in Carr.

11 I'm gonna switch over to my other motion. But I just
12 wanted to say that there is no requirement at law for dispersal
13 order. Carr makes that clear in these situations, when you
14 don't have -- when you have a group that is acting cohesively,
15 you don't need a dispersal order. Papanow --

16 THE COURT: What you need to do is to be reasonable in
17 your belief, as a police officer, that everybody you have
18 arrested is part of the collective unlawful assemblage, right?

19 MR. FARRELL: That's correct. And in fact, says we
20 have articulated, I believe demonstrate that the police
21 officers at these two locations made reasonable efforts to do
22 that. And that's the probable cause standard.

23 You know, if reasonable officers could disagree or a
24 mistake was made, then these officers are entitled to qualified
25 immunity. These are very difficult circumstances which the

1 police officers are facing when they are trying to police a
2 large crowd. The DC Circuit recognizes that. You have these
3 officers trying to do the right thing. They give warnings.
4 They try to make decisions about who is in the crowd and who is
5 not. And it's all captured on videotape. At both locations
6 there are two high-ranking officers who consult and say, you
7 know what, you know, the facts presented to us show that we
8 believe that there was criminality here. If there is --

9 THE COURT: Are you suggesting that Monahan consulted
10 with people before he stopped that march?

11 MR. FARRELL: I'm saying that it was a joint decision
12 between Chief Galati and Chief Monahan to make the arrest.
13 They either both came to it independently, or they both agreed
14 upon it. And from the Police Department's -- the law says when
15 it is collective knowledge, the knowledge of one can be assumed
16 by the other when you are going to be making arrests in that
17 way. And in fact Mr. Spiegel added Chief Galati as a defendant
18 in these cases based upon the fact that he was involved in the
19 decision to make the arrests and in fact Magistrate Judge
20 Francis granted that.

21 So you have two senior officers deciding that probable
22 cause exists. And what I'm suggesting is the law of qualified
23 immunity -- could it be a mistake here? Yeah, this could be a
24 mistake. But that's what qualified immunity is intended to
25 protect. Qualified immunity is intended to protect, quote, in

1 the Supreme Court case, Ashcroft, all but the plainly
2 incompetent. And I'm going to end on this section by saying at
3 those two locations, the steps that the officers made do not
4 make them plainly incompetent. They try, they tried to do the
5 right thing. You may say, hey, maybe this could be a
6 disagreement about it, but then that's the case that dictates
7 for the granting of qualified immunity to these officers.

8 So I'm going --

9 THE COURT: Judicial immunity even covers the
10 incompetence, which is something that I take solace in every
11 day.

12 MR. FARRELL: So unless your Honor has other
13 questions, I could go on on this, but I need to utilize my time
14 and go on to the other motion.

15 THE COURT: Yeah, you have 20 minutes.

16 MR. FARRELL: So the City has made a motion for
17 summary judgment on it's two policies. One was to have people
18 who are engaging in RNC related unlawful conduct put through
19 for a custodial arrest or receive a DAT of eligible. And in
20 these cases, that has been shortened to be called a no summons
21 policy, so I'll refer to it as the no summons policy. The
22 second part of that was that those people arrested, pursuant to
23 that policy, would be fingerprinted.

24 Plaintiffs in these RNC cases have basically agreed
25 and dismissed a lot of their claims either explicitly or they

1 have abandoned them. That's set out in our reply brief. We
2 delineate all of those. What's left are three things.
3 Plaintiffs make a First Amendment challenge to the policy,
4 excluding a retaliation claim, they are not making a
5 retaliation claim against the defendant City only. Part of
6 what they've said is they are not making any claims against the
7 individuals. So the City should get summary judgment on those
8 claims, the claims against the individuals should all be
9 dismissed. The only claims that are left are against the City,
10 and there is only three. One is a First Amendment challenge,
11 as I have said, the policies, but not retaliation claim. The
12 second is a claim limited to the McNamara plaintiffs that the
13 policy violated the Fourth Amendment.

14 The Schiller and Dinler plaintiffs, explicitly say
15 they are not making such a claim for violation of the Fourth
16 Amendment or for those policies, summons and fingerprint
17 policies under the Fourth Amendment. And I would suggest to
18 the Court that if the plaintiff's counsel for Schiller and
19 Dinler are not making a claim under the Fourth Amendment for
20 those two things, that the next best thing has no reasonable
21 hope of being successful, otherwise they would have promoted
22 such a claim.

23 THE COURT: Well, wait. You're going to say that
24 because they abandoned the claim, and I have to assume that
25 there is no merit to it?

1 MR. FARRELL: I think that's reasonable.

2 THE COURT: I'm just farm out all my stuff to
3 Mr. Dunn. Let me know how it goes.

4 MR. FARRELL: Having litigated against Mr. Dunn, I
5 know he would not forego a claim if he thought there was a
6 chance of success at it.

7 THE COURT: So I should assume that the ones he is
8 keeping are pretty good?

9 MR. FARRELL: No -- those are only ones that have a
10 slight chance of --

11 THE COURT: All of this laughter is coming out of your
12 time?

13 This third is a state law claim regarding alleged
14 violation of New York Criminal Procedural Law 160.10. And,
15 again, that's against the City only.

16 THE COURT: Let's start with that one. Actually,
17 that's a matter of statutory construction, right? The language
18 in the fingerprinting statute, that's what we're talking about,
19 right?

20 MR. FARRELL: Yes.

21 THE COURT: Pretty explicit, it seems to me. It says
22 that, basically, an officer for offenses like the ones at issue
23 here can only fingerprint if there are two exceptions, right?

24 MR. FARRELL: Yes, your Honor.

25 THE COURT: Let me find it.

1 MR. FARRELL: Right, it says that you may fingerprint
2 when those things exist.

3 THE COURT: Well, it says: In addition, the police
4 officer who makes an arrest for any offense, either with or
5 without a warrant, may take or cause to be taken the
6 fingerprints of the arrested person if such officer, (a), is
7 unable to ascertain such person's identity or, (b), reasonably
8 suspects that the identification given by such person is not
9 accurate or, (c) -- which doesn't really apply here --
10 reasonably suspects that such person is being sought by law
11 enforcement officials for the commission of some other offense.
12 So we're really just talking about 2(a) and 2(b), right? And
13 those are the conditions that are -- I mean it's either (a) or
14 (b) that are necessary to enable a police officer to take the
15 fingerprints of a person charged with an offense such as this,
16 correct?

17 MR. FARRELL: Well, on the face of the statute, it
18 doesn't prohibit fingerprinting in other instances, but it does
19 say, it does say what you have read.

20 THE COURT: So you're suggesting that what it really
21 says is that a police officer may take fingerprints in his or
22 her complete discretion, and by the way we'll list a couple of
23 things that might justify the taking of fingerprints, but by no
24 means is this an exhaustive list? That's the way judges write,
25 but not the way legislators do.

1 MR. FARRELL: I'm not sure that the statute is always
2 that clear, what I'm pointing out is that you can't take it.

3 THE COURT: All right. Well, it says that the
4 condition of the officer -- well, it says the officer may take
5 the fingerprints if (a) or (b). You're suggesting that it
6 means that he may also do it under other circumstances not
7 mentioned here.

8 And do you have any authority for that?

9 MR. FARRELL: No, just a plain reading of the statute,
10 your Honor.

11 THE COURT: All right. So let's talk about (a) and
12 (b) then. So: If unable to ascertain such person's identity.

13 I mean, so, what is the evidence for being unable to
14 ascertain such person's identity. Seems to me both (a) and (b)
15 are really turning on intelligence that was received before the
16 convention that some portion, or some persons who might be
17 there to upset the proceedings or to cause civil unrest in the
18 City, were going to not be bringing identification, or bringing
19 false identification; correct?

20 MR. FARRELL: Yes, your Honor.

21 THE COURT: And so you're saying that that
22 intelligence would justify a policy to fingerprint everybody
23 who got arrested during that time frame of the convention?

24 MR. FARRELL: Well, this only pertains to violations;
25 people arrested for felonies and misdemeanors have to be --

1 THE COURT: No, I get that. Just those for
2 violations.

3 MR. FARRELL: Right.

4 And in response to that, the City had intelligence,
5 which is set out in our papers, which says that people were
6 coming here to engage in unlawful activity, would also be
7 bringing false identification. And on top of that, as a
8 mechanism, how are you going to allocate police resources and
9 how are you going to handle the possibility of large-scale
10 arrests, it made a decision that everyone was gonna be
11 fingerprinted. It did that because it believed that there was
12 a high likelihood of people would have false identity.

13 THE COURT: But wait a minute. The time it takes to
14 fingerprint somebody is probably longer or equally time
15 consuming as having the officer look at the ID and say that
16 looks like you, this seems like it's legit. I mean so I don't
17 understand why you can't just -- why this is a decision that is
18 left up to the individual officer who is taking the photo I.D.
19 as opposed to saying nobody is going to be able to show us
20 their photo I.D. because we're fingerprinting everybody.

21 MR. FARRELL: Well, due to the security interests in
22 the RNC, we submitted a declaration from Brian Jenkins, who
23 supports the conclusion that, in today's society, fraudulent
24 IDs can look as real, as real as real IDs. And presenting an
25 ID that looks otherwise --

1 THE COURT: But that's true whether you are at the
2 Republican National Convention or anyplace else, right?

3 MR. FARRELL: But the difference, there, is that
4 during the Republican National Convention, there were
5 heightened security concerns for all of the reasons that are
6 set forth in our papers. There was concern that you were going
7 to have people coming here to engage in violent acts, there was
8 the possibility of terrorism during the RNC. There was also
9 the City wanted to get the best possible prosecution against
10 the people that were involved in the unlawful activity. And to
11 make sure that you have the right person. The way -- the best
12 way to try to ensure that you have the person it says who they
13 are is to fingerprint. And that's set out in --

14 THE COURT: That's always gonna be true. But the
15 issue is that the statute limits it to two circumstances, it
16 seems to me.

17 And so the first is whether the police officer is
18 unable to ascertain such person's identity, or reasonably
19 suspects that the identification given is not accurate. And so
20 it seems like there to was no attempts to do either of these on
21 an individual basis, correct?

22 MR. FARRELL: We concede that it was not done on an
23 individual basis, your Honor. Because, as we have set forth,
24 the totality of the circumstances and the security interests
25 that were at stake and the reality of fraudulent

1 identification, and on top of that the fact that the Police
2 Department knew that a lot of people were going to be coming in
3 from out of state, where officers were not going to have
4 familiarity with those types of identifications, drivers
5 licenses, whatever else people may show, there was a whole host
6 of reasons that warranted, under these circumstances, to
7 trigger those two exceptions that there was a reasonable belief
8 that you were not being shown proper identification, which is
9 different than your every day nonRNC situation.

10 THE COURT: Well, but I mean -- I think everyday
11 situations, people might have incentives to use false
12 identification. Anybody who finds themselves on the wrong end
13 of a summons or the wrong end of a police officer is going to
14 have some incentive not to necessarily give the correct
15 identification. And if false identifications are that
16 ubiquitous and easy, seems to me the best thing to do would be
17 to change the statute, but --

18 MR. FARRELL: Well, your Honor, the ability to get
19 false IDs is very different from when the statute was first
20 written however many years ago. And, again, the dates are in
21 our papers. Technology has changed --

22 THE COURT: That's true. But is that a basis then for
23 police officers to, or for a police department to just say,
24 well, we are not doing that anymore because technology has
25 changed?

1 MR. FARRELL: For that event, I believe it is.

2 THE COURT: Why not just generally, why can't the NYPD
3 say, then, you know what this, statute was written in -- I
4 don't know when it is -- oh, my goodness, 1971. So -- with
5 some amendments in 2010. But let's just assume now the Police
6 Department says, oh, this is completely out of date, we're not
7 going to do this, so we're going to adopt new policy that
8 countermands this statute. They can do that?

9 MR. FARRELL: We are not saying it's a new policy.

10 THE COURT: But I'm asking to you indulge me and say
11 if a police department said that, that would be okay according
12 to the statute?

13 MR. FARRELL: No, I would not say they are rewriting
14 the statute. I'm saying the reality of that statute, when you
15 reasonably suspect someone doesn't have the proper ID or has a
16 fake ID, in 2012 people can generate ID off a computer that
17 they couldn't do in 1971. Now, I'm saying they would fit
18 within the exception of that statute.

19 THE COURT: Well, but it has to be a reasonable
20 belief.

21 MR. FARRELL: Right. And the reasonable -- sorry.

22 THE COURT: So I mean that's the inquiry, is whether
23 there is a reasonable belief. And it seems to me what you're
24 saying is that, in 2012, and maybe even 2004, that it would be
25 reasonable to believe that everyone has got fake ID and,

1 therefore, the statute no longer applies.

2 MR. FARRELL: I'm saying the -- I'm not saying the
3 statute doesn't apply, I'm saying it's two parts of it. One is
4 we have to recognize the reality of how easily accessible
5 fraudulent identification is in today's -- in 2004 and today.
6 And, two, there were special circumstances revolving around the
7 RNC that warranted to make a policy decision, rather than
8 leaving to ad hoc determinations under those circumstances of
9 the RNC when you are faced with possibility of mass arrests and
10 large quantities of people to fit within the parameters of that
11 statute.

12 THE COURT: But then it turns on whether that policy
13 is reasonable, I guess, right? You're just saying it has to be
14 reasonable. Reasonableness is the test. But policy, in the
15 event of a large event like the RNC is more appropriate than
16 just leaving it up to the individual police officers.

17 MR. FARRELL: That's what we're saying, your Honor.

18 THE COURT: Well, let's get to other policy,
19 because --

20 MR. FARRELL: The other thing I would say, your Honor,
21 is, on the fingerprinting statute, that there also is no
22 private right of action stated for a violation of that statute.

23 THE COURT: Now, there is some precedent that has
24 allowed a private right of action and damages. It goes back to
25 1950 or something, right?

1 MR. FARRELL: I believe so. I think it may -- I don't
2 really want to use my time discussing those cases. And if you
3 do, we can have a discussion, I brought one of my colleagues
4 for that.

5 THE COURT: No, let's just get to the --

6 MR. FARRELL: Right. There is no explicit private
7 right of action. And I would say that the other sections of
8 the criminal procedure law provides for the destruction of
9 those fingerprints. And that was the remedy that the
10 legislature intended to provide in that event. Not just on
11 awarding a lot of individual damages claims, but that statute
12 was initially written so you could create fingerprinting data
13 bases for the benefit of the police department. It wasn't for
14 the benefit of individuals.

15 THE COURT: Wasn't designed to be punishment, right?

16 MR. FARRELL: No. And we are only talking about --
17 this is only the criminal procedural law. The section, under
18 the Constitution --

19 THE COURT: I got it. Move to the next point.

20 MR. FARRELL: All right, so --

21 THE COURT: No summons policy.

22 MR. FARRELL: Yeah, no summons policy.

23 So the first question is whether the no summons policy
24 imposed a direct and substantial burden on First Amendment
25 activity. And this was a policy that was not directed at

1 speech, there is no way around that. The policy was to only
2 apply if you were perceived to have broken the law. And this
3 goes back to my hundred thousand people that demonstrated.
4 They all demonstrated without being subject to the no summons
5 policy. Because they were not perceived to be breaking the
6 law, they were not arrested. So the policy is clearly just by
7 the size and scope of the demonstrations that took place where
8 the policy didn't apply, shows that the policy was not directed
9 at First Amendment speech, it was directed at --

10 THE COURT: Let me interrupt. I mean if somebody is J
11 walking on a street in a different part of Manhattan, they are
12 not subject to the no summons policy, right, even during the
13 time period of the convention, correct?

14 MR. FARRELL: If --

15 THE COURT: If you were J walking on 10th Avenue and,
16 you know, 12 Street where there is nothing going on, presumably
17 you were not subject to the no summons policy, right?

18 MR. FARRELL: I don't believe J walking was one of the
19 concerns that was a threat that were identified.

20 If you were involved in unlawful activity that the
21 intelligence had said was a concern to the City, because it was
22 intended to disrupt, shut down the RNC, shut down the City,
23 block the ability of the City to operate, have emergency
24 vehicles operate, to have delegates be able to get to the
25 convention, to and from hotels and other events, that was the

1 type of conduct that the policies were directed to address.
2 And it is only to unlawful conduct. The only time the policies
3 were triggered is if you were arrested for unlawful conduct.
4 But unlawful conduct, I just want to be clear about this.
5 There is unlawful conduct and there is unlawful conduct. What
6 you just said is this is unlawful conduct that was believed
7 designed to disrupt the Republican National Convention.

8 MR. FARRELL: Or the City. It was -- yeah, it was the
9 types of threats and conduct that the intelligence information
10 that had been developed said was going to try and shut down the
11 City, generally, or shutdown the RNC.

12 THE COURT: But are you suggesting that somebody who
13 engaged in that conduct, far removed from the RNC, was going to
14 be subject to the no summons policy.

15 MR. FARRELL: If they were engaged in unlawful conduct
16 that the police officer believed was of the type that had been
17 identified --

18 THE COURT: Well, maybe -- so what is the type that
19 has been identified?

20 MR. FARRELL: Well, it was -- well, it was generally,
21 as I had said, conduct intended to disrupt the City, disrupt
22 the RNC. And that conduct could take place in outer boroughs.
23 Some of these events, some of the possibilities were that this
24 was going to be coordinated conduct. There were discussions of
25 plans of people who wanted to do this, they were going to

1 create diversions out in outer boroughs to draw police
2 resources out there so they could do things here in Manhattan.

3 There is a whole host of reasons why it is not the
4 proximity or the location of the conduct, but it's the type of
5 conduct, illegal conduct, that the department anticipated.
6 That's what the policy would apply to.

7 THE COURT: But you're telling me, so you like to run.
8 And so you, in Queens, decided with your buddies to do a little
9 road race. You're saying you and your friends, during the
10 period of the Republican National Convention would have been
11 subject to the no summons policy, even though you had no
12 interest in disrupting the RNC and no interest in making any
13 kind of political statement, you are saying that you and your
14 buddies would have been subject to the same no summons policy.

15 MR. FARRELL: No, I think the testimony is clear.
16 Chief Esposito has testified that the policy didn't apply to
17 things that would have been going on anyway, absent the RNC.
18 The concern was the RNC and the undeniable intelligence that
19 there was a mass movement to try and disrupt the City and the
20 RNC during that time. So if there was a demonstration that was
21 going on, had nothing to do with the RNC and had to do with
22 some, you know, business dispute, the policy didn't apply
23 there. I mean we have laid that out in the declarations. It
24 is in chief Esposito's testimony. So it's the unlawful conduct
25 that is at issue, and --

1 THE COURT: So somebody who was protesting the
2 nonunion workers at a building and is engaging in the same
3 activity, they're not subject to the no summons policy, but
4 somebody who is against the War in Iraq would be subject to the
5 no summons policy.

6 MR. FARRELL: No.

7 THE COURT: No.

8 MR. FARRELL: The policy was not content based.

9 THE COURT: Well, you could say that all you want, but
10 you just said it was people directed towards disrupting the
11 RNC. So somebody outside of a building protesting, and with a
12 group of people, protesting the nonunion workers who had been
13 brought into that building, that big rat, you know how it's
14 done, they are doing that. So you are suggesting to me that
15 those folks would not be subject to the no summons policy, but
16 somebody who just, frankly, doesn't care about union workers or
17 nonunion workers, but is really against the War in Iraq and
18 wants to send that message to the Republican National
19 Convention, they would be subject to the no summons policy.

20 MR. FARRELL: It's not the War in Iraq that triggers
21 the policy.

22 THE COURT: Well, what is it, it's that they wanted to
23 disrupt the RNC.

24 MR. FARRELL: And shut down the City. Yeah, it's
25 unlawful conduct.

1 THE COURT: Well, they don't want to shut down the
2 whole City, they just want to shut down maybe a couple blocks
3 in front of the RNC, just like the folks in front of the
4 nonunion building want to shut down that block.

5 MR. FARRELL: No, I disagree, your Honor.

6 I mean the intelligence clearly shows that they want
7 to disrupt the City in its entirety. The delegates were
8 staying at various hotels throughout the City. They all were
9 not in a two-block radius at Madison Square Garden. There were
10 events at those hotels, people going to the theater district,
11 there were dinners --

12 THE COURT: I get all that. The whole issue here is
13 almost a silly exercise, but that's what the law requires
14 because of the different levels of scrutiny, right? So if it's
15 content neutral, it's one level. And if it is content
16 specific, it's a different level.

17 You're arguing that its content neutral. And I'm
18 pressing you on that to say that its designed that any activity
19 that is going to disrupt the Republican National Convention
20 gets sort of close to content specific, doesn't it?

21 MR. FARRELL: No. The message doesn't matter. It is
22 not message based. The content of the speech is irrelevant.
23 It's the act of the unlawful conduct that triggers the policy.
24 The speech doesn't matter --

25 THE COURT: So if the intent is to mess with the

1 Republicans, it is one thing, but if the intent is to mess with
2 people of other political persuasions, it's less of a big deal?

3 MR. FARRELL: No one was making judgments about when
4 the policy applies to what. The message was who they were
5 intended to mess with. The message was whether they believed
6 those people were here to disrupt the city and shut down the
7 City during the time period of the RNC.

8 THE COURT: Clearly not specific to whether one is for
9 the war or against the war, whether one is pro life or pro
10 abortion or pro choice, right, it is not that. Because we had
11 protestors, in fact, who got arrested for being -- criticizing
12 the Republicans for not being pro life enough or conservative
13 enough, right?

14 MR. FARRELL: Yes, your Honor.

15 THE COURT: All right. So you're urging, then,
16 intermediate scrutiny.

17 MR. FARRELL: I'm urging two things. Before I even
18 get to immediate scrutiny, I'm saying that because saying that
19 conduct and not speech, that they can't even meet the threshold
20 burden that they have to show that the policy places a direct
21 and substantial burden on First Amendment activity.

22 Assuming arguendo that it does play, that they do meet
23 the threshold burden and show there is direct and substantial
24 burden on First Amendment activity then, yes, intermediate
25 scrutiny should apply, because it's not a content-based policy.

1 It's based upon conduct.

2 THE COURT: Okay.

3 MR. FARRELL: So the intermediate scrutiny test has
4 two parts to it; must advance important governmental interests
5 and must not burden more speech -- substantially more speech
6 than necessary.

7 I think that, you know, the part about what the
8 interest that -- the important governmental interests that were
9 advanced, I'm not going to repeat. Those are all set out in
10 our papers. Just in summary, the interests that advanced were
11 that policies combatted threats to public safety, they ensured
12 the flow of pedestrian traffic, they were sought to control
13 spiraling criminal conduct, they ensure that the RNC was not
14 shut down --

15 THE COURT: Is it legitimate to say we just want to
16 make sure that these folks only get to protest once a day,
17 because if we just give them a summons, they will just collect
18 tickets and not be moved or deterred, is that a legitimate
19 interest?

20 MR. FARRELL: I think there is two things there.

21 One is if you didn't break the law, you could have
22 protested to your hearts desire. And 800,000 people did do
23 that. If you broke the law, then there was a legitimate
24 interest in making sure that that conduct didn't continue,
25 because the intelligence information showed that people were

1 coming here with the intent to do that. And if you issue
2 someone a summons on the street, and they are intending to
3 block traffic or shut things down, that summons is not going to
4 deter them. We submitted a declaration from Carl Holmberg who
5 has many years of experience up in Washington. And he confirms
6 all of those, all of those things. And when you -- and you
7 also have the threat of spiraling disorder. You know what had
8 happened before the RNC, and this is all set out in Chief --
9 Commissioner Cohen's declaration, there were other cities that
10 had hosted similar large-scale events. These are undisputed
11 facts; Seattle in 1999, hosted the World Trade Organization --

12 THE COURT: I know that.

13 MR. FARRELL: Miami, 2003.

14 THE COURT: I know that. Don't tell you me what I
15 know, you are on the clock, in fact, you are over time.

16 MR. FARRELL: I will try and speed up to the
17 conclusion.

18 I think that the important things that are undisputed
19 that the Court should recognize as undisputed and that the
20 plaintiffs don't dispute, is that Commissioner Cohen provided
21 information about an Apartheid threat to the Executive
22 Committee, which included the police commissioner and Chief
23 Esposito. That three-prong threat involved terrorism, anarchy,
24 and widespread civil disobedience. The Schiller brief and
25 Macnamara brief both concede that plaintiffs recognize the NYPD

1 had information indicating that New York City faced threats of
2 substantial disorder or worse during the convention. And
3 further, that it used this information in planning for the
4 convention. That the Schiller brief three in opposition, and
5 in Macnamara they make a similar admission in their brief on
6 page 1.

7 The threats were informed by information that was
8 collected specifically for the RNC, which is set out in the end
9 user reports. It also was informed by those prior large-scale
10 disorder events. And, indeed, the Second Circuit has
11 recognized in these RNC cases and their law enforcement
12 privilege decision, they recognized that Commissioner
13 Cohen's --

14 THE COURT: I remember that. I remember that one,
15 yes, yes, yes.

16 MR. FARRELL: They credited Commissioner Cohen's
17 research and analysis of security threats at other large
18 events, including Seattle and Miami. And they said, they
19 recognized that the NYPD needed a strategy to avoid disorder
20 and violence during the RNC. The Circuit recognized that based
21 on the end users reports that were before them.

22 The policies were in effect for a total of seven days,
23 that they were in effect for seven days and they ended. This
24 is not a statute that was adopted to last in perpetuity or for
25 other days of the year, it was only during the time period in

1 and around RNC. That is all the undisputed factual evidence.

2 I talked about what the needs were. Then the law
3 requires that they fit, the policy be a reasonable fit between
4 the policy and the government interest, and not burden more
5 speech than is reasonably necessary. The one example we
6 already talked about which is the continuous unlawful activity,
7 is the perfect example of the reasonable fit. How to get the
8 people, clear the condition, open the street up. You know,
9 just think about 16th Street where you had all of those people.
10 If you start issuing summons to those people, it was clear that
11 they intended to keep breaking the law. The testimony in that
12 case was police vehicles couldn't even get close to that
13 location, because the traffic had backed all of the way up.
14 They had to get out of their cars and run down. The same thing
15 is true for ambulance, fire trucks, if you had emergency
16 response vehicles, you couldn't do any of those things.

17 THE COURT: Mr. Farrell, I think I have got you 10
18 minutes over what I gave you, so do you want to rap it up?

19 MR. FARRELL: I'll rap it up. And I'll save for
20 rebuttal plaintiff's arguments as to why they attack the
21 policies, also set out in our brief.

22 I also say the Macnamara plaintiffs, their argument
23 that there is no Constitutional right to a summons, all you
24 need to do is look at Virginia v. Moore and Atwater, and it's
25 clear there is no Constitutional right to a summons that

1 disposes of their case. To the extent they are still trying to
2 allege equal protection claim, they have not met the comparative
3 group. They have not also shown any animus in the record by
4 the Police Department for adopting the policies.

5 And with that, I'll save the time you permit me or my
6 colleagues for rebuttal.

7 THE COURT: That will be purely at my discretion.

8 MR. FARRELL: Okay.

9 THE COURT: Who are we going to hear from here, Mr.
10 Dunn?

11 MR. DUNN: You can call me Judge Dunn, if you want, so
12 let's --

13 THE COURT: Doesn't pay much, but I guess --

14 MR. DUNN: Let's start with the no summons policy.
15 Your Honor, clearly, this was a content-specific
16 policy. It was not viewpoint specific, it was content
17 specific.

18 If you were involved in expressive activity connected
19 to the convention, you got checked into Pier 57. If you did
20 not, you did not. So take your J walking example, I will
21 answer the question. If you had been J walking at 10th and
22 12th without anything connected to the RNC, yes, you would have
23 gotten a summons and been on your way. If you -- did that with
24 an RNC related sign in the Bronx, or in the farthest corner of
25 Queens, you were going to Pier 57. Everybody who went to Pier

1 57 was a protestor or connected to the protest.

2 Meanwhile, many people who engaged in the exact same
3 conduct during the convention got summonses, including people
4 right in Madison Square Garden who were charged with disorderly
5 conduct and this quality of life initiative the department ran,
6 directly across the street from the Garden, they got summonses.
7 This was a protest policy. And, certainly, on summary
8 judgment, we get that.

9 Second issue is the justifications for the policy.

10 And again, this is --

11 THE COURT: Well, I mean so you're saying it is
12 content specific, but what Mr. Farrell is saying is that this
13 is not imposition on First Amendment rights, right?

14 MR. DUNN: He did say that. And I don't think Mr.
15 Farrell would say that tomorrow the department adopted no
16 summons policies for African-Americans, that was not a race
17 based policy. Of course this was a speech policy.

18 THE COURT: That would be equal protection argument?
19 Right.

20 MR. DUNN: Well, equal protection argument, but there
21 would be no question that would be a race policy. Just like
22 this policy was an RNC protest policy. To be sure, you had to
23 be charged with an offense. But, then, they separated two
24 groups of people; the people that charged with that offense
25 while engaging in a protest activity got to go to Pier 57.

1 Everyone else got to go home. And I would submit that is as
2 much as speech based policy as anything. And given that it's a
3 speech based policy, it's subject to strict scrutiny. Even if
4 it is subject to intermediate scrutiny, and we think it is
5 subject to strict scrutiny, there is then the question about
6 what's the reason for the policy, and is it actually narrowly
7 tailored. Here, we have big factual dispute. Mr. Farrell
8 wants to treat the policy as being based on certain things.
9 But of course there is a big dispute about that. You know,
10 this is a policy that, according to the City, was adopted by
11 Commissioner Kelly. Commissioner Kelly is completely absent
12 from this case. There is no testimony from him. There are no
13 documents about the reasons for the policy. What the City is
14 left with is the memory of Chief Esposito, the chief of the
15 department. And Joe Esposito is a good guy, but he has a
16 terrible memory. And when you look at the deposition
17 transcript -- and we put this in. He doesn't remember the
18 particulars of about the policy. Indeed, he testifies he has
19 got the wrong date by many months about when the policy was put
20 into place. He testifies in his deposition, when specifically
21 asked, that he has no recollection of the meeting where policy
22 was adopted in the conversation during that meeting. And he
23 testifies that this was a policy that had been put in place for
24 many prior events. The fact of the matter is, on summary
25 judgment, when we get all of the facts construed in our favor,

1 what you are left with is a policy that was seemingly adopted
2 without any deliberation very early in the game, that was just
3 a repeat of a policy from before. It had nothing to do with
4 intelligence, it involved no deliberation that we can tell.
5 And given that there is no basis for suggesting that that
6 policy meets any sort of narrowing test, and any sort of
7 compelling or intermediate scrutiny.

8 THE COURT: Well am I supposed to check common sense
9 at the door. You read what Second Circuit said on these
10 things, they seem to be very concerned about law and order,
11 maybe more than I am. What is the response to that. I don't
12 need Joe Esposito to remember the specifics of a meeting to
13 know what are the obvious reasons to have a policy like this,
14 right? Aren't they going to say that?

15 MR. DUNN: Not on summary judgment, they are not, your
16 Honor.

17 THE COURT: Depends on the panel.

18 MR. DUNN: Fair point. And no one is more of a law
19 enforcement person than you are.

20 THE COURT: I don't know about that.

21 MR. DUNN: Well, let's talk about the intelligence.
22 You want the talk about the intelligence, I mean, the City
23 makes a big point of saying the intelligence played a big role
24 in the policy. But when you look at the facts, at least
25 certainly on summary judgment, and even otherwise, everything

1 suggests otherwise. As you may recall, we got to within three
2 days of the completion of pretrial discovery in the case,
3 before the City ever mentioned Commissioner Cohen. And before
4 the City ever mentioned this intelligence gathering operation.
5 And we're year and a half, two years into the case. And, all
6 of a sudden, Commissioner Cohen, for the first time, shows up.
7 So we have the whole process with the Circuit, as you know, and
8 how long that took, and then we depose Commissioner Cohen, and
9 he says in his deposition I never participated in conversations
10 about the policy, I didn't even know about the policy until
11 after the convention was over, even though he was sitting in
12 all of these meetings with Commissioner Kelly and Joe Esposito.

13 So when I look at those facts, it may suggest that
14 there was common sense that this intelligence was being used
15 for some reason. And I'm not suggesting for a moment that the
16 City wasn't concerned about the information in the
17 intelligence, wasn't maybe using it in some police setting.
18 But that's a very different question in whether or not it
19 played a specific role in the policy. And there is no evidence
20 certainly on summary judgment, a trier of fact, including a
21 jury, could reasonably conclude that the intelligence played no
22 role in the policy, and they were simply adopting the policy as
23 it had for many prior events.

24 So then you are left, even if in you want to suggest
25 the intelligence played some role, and I'm not going to get

1 into the details of this. But then the question would become
2 what in the intelligence allows the City to single out protests
3 as the sole source of threat for disorder during the
4 convention.

5 And Mr. Farrell might want to say those people walking
6 along the sidewalk on Fulton Street were the biggest threat
7 that the City faced, or he may want to say that Georgianna, a
8 former client of ours, one person standing in front of a Honda
9 Dealership with a sign, who ended up going to Pier 57, was some
10 huge threat to the RNC. But I would submit to you, your
11 Honor -- we detail this in our briefs -- that when you look at
12 the intelligence, nobody could conclude, as a matter of law,
13 that this policy was narrowly tailored to the concerns that is
14 in the intelligence, such that the City could single out
15 protestors with a no summons policy, which is what it did.

16 Very quickly on the fingerprinting, I think you
17 understand the fingerprinting. The statute says what it says.
18 There is undisputed evidence from many plaintiffs, including
19 all of ours, they had ID, they showed them ID, it was valid ID,
20 the City does not get to ignore a state statute. They want to
21 change it, they can change it.

22 THE COURT: Well, I guess the argument is that the
23 statute doesn't require an individualized police officer
24 determination, that the policy can be used, instead, where
25 there is a reasonable bases to support the policy, right? But

1 you're saying that that is unsupportable as a matter of
2 statutory construction?

3 MR. DUNN: Yes. You asked Mr. Farrell is there any
4 case law to support that and he said no.

5 THE COURT: Any case law that goes the other way?

6 MR. DUNN: I don't think --

7 THE COURT: Not a lot of case law on this one, right?

8 MR. DUNN: I don't think it's my burden to show case
9 law that establishes what the statute says on its face. The
10 statute, on its face, says they have to have a reason to
11 suspect the bona fides of the ID of the person in front of
12 them.

13 THE COURT: The statute says that a police officer who
14 makes an arrest may take the fingerprints if such police
15 officer is either unable to ascertain the identity, or suspects
16 the identification is not accurate.

17 So you're saying that that means that only the
18 arresting officer is able to make that determination?

19 MR. DUNN: Well, it doesn't have to be the arresting
20 officer, it has to be the officer that's --

21 THE COURT: The statute says -- no, no the statute
22 says a police officer who makes an arrest --

23 MR. DUNN: Okay.

24 THE COURT: -- may take, or cause to be taken.

25 MR. DUNN: Recognizing that could involve an officer

1 who is processing an arrest -- I think that's absolutely right.
2 The person who is handling the arrestee, by the very terms of
3 the statute, has to have a reason to question that person's
4 identification.

5 THE COURT: Again, that's not the language of the
6 statute. Maybe you should have the statute changed. The
7 statute is limiting it to the arresting officer.

8 MR. DUNN: I understand that. But the arresting
9 officer is the person processing the person. That's what
10 happens. The arresting officer takes the person -- I am in
11 agreement with you that, yes, the arresting officer has to have
12 that. What they cannot do, by virtue of information you had
13 months beforehand about other people, we are gonna conclude
14 across the board that every person that presents themselves to
15 us, even if they have a valid drivers license, we don't have to
16 take that into account, and we can assume that we can print
17 them, which is what they did.

18 THE COURT: And what about whether or not this creates
19 a private right of action, and whether the remedy is damages as
20 opposed to just the fingerprints getting destroyed?

21 MR. DUNN: As you point out, there are three cases
22 where the New York courts do exactly that, namely there were
23 damages for unlawful fingerprinting. I agree there is not a
24 large body of case law out there, but there are three cases all
25 of which do the exact same thing. And in those three cases,

1 while you are absolutely right that those are older cases, they
2 are completely consistent with the case law in New York now
3 about implied causes of action. And, you know, we said set
4 that out in our brief. But, clearly, this is a statute that
5 was intended to protect people from being improperly
6 fingerprinted. And recognizing the violations consistent with
7 that.

8 And there is no other remedy. I mean, yes, you can
9 get your fingerprints sealed if there is a certain outcome in
10 the case, but that's not a remedy for the taking of the
11 fingerprints themselves and the damages associated with that.
12 And we have three courts that have awarded damages to people in
13 New York for exactly that.

14 So the final thing I want to say --

15 I'm sorry, unless you have further questions on the
16 fingerprinting.

17 THE COURT: No.

18 MR. DUNN: I want to go back to the false arrest
19 issues, very briefly, in reply to that.

20 I think you're completely clear about what the law is
21 on this. I don't know if there is any disagreement between the
22 plaintiffs and you. But one issue I want to emphasize about
23 16th Street, and you were focusing on this, was what's
24 dispositive is, given that the marchers, however you want to
25 describe them, got routed into a city block full of people, the

1 dispositive question is what did the City actually do, or what
2 did Inspector Essex do to separate the people who were perhaps
3 the lawbreakers from everyone else there.

4 And you're right, the record is very sparse on this,
5 the City has put in very little. But what is there is Essex
6 says he sent Cartwright and Johnson down the block, without any
7 amplification, without any clear instructions, to tell people
8 something about leaving the block.

9 THE COURT: All right.

10 MR. DUNN: And he says in his deposition, after about
11 five minutes, he then started making arrests.

12 THE COURT: Right. So assume all of that to be the
13 case.

14 MR. DUNN: That's right. So then the question is, is
15 it reasonable in the circumstances in which he found himself,
16 namely he has to seal off a block full of all kinds of people,
17 some of which may be lawbreakers, many of which may be not, is
18 it reasonable, as a matter of law, for him to conclude, based
19 upon having sent two people down the block without any sound
20 amplification, without any clear instructions, and without an
21 order to people at the lines at either end to let people out,
22 was it reasonable under the circumstances for him to conclude
23 that, five minutes later, that everybody in the block had
24 engaged in unlawful activity and can be arrested.

25 And we submit as a matter of law, that cannot be

1 reasonable and, therefore, we are entitled to summary judgment.

2 THE COURT: Okay, thank you.

3 MR. SPIEGEL: Your Honor, I'm going to be very brief
4 on Fulton Street, because it is clear that there is a deep
5 understanding of what happened there on the Court's part.

6 Mr. Moore assisted me with the Vodak reference
7 regarding permission, then having been withdrawn. I want to
8 look at the three violations that Mr. Farrell relied upon; more
9 than two people abreast, crossing against the traffic light,
10 parentheses, at an intersection at which police officers are
11 guiding people across the street -- which I think obviates that
12 one on its face. But even accepting that, the final one was
13 that the banner was turned.

14 Incidentally, the two banner carriers, as it turns
15 out, were not arrested. They actually ended up on the other
16 side of the police lines, so they were not arrested at Fulton
17 Street. But accepting that those three things took place, it
18 does not support the City's position that that leads to a
19 conclusion that 227 people on that block had banded together to
20 violate the law. It's as simple as that.

21 The final thing I wanted to address, very briefly, Mr.
22 Farrell said that they did a sorting process after the 227
23 people were surrounded. And the basis for that sorting process
24 was credentialed media were released which, on its face, is an
25 admission that the basis for releasing people was not their

1 conduct that had been observed beforehand, but was their status
2 as credentialed media. That's the entire basis of the sorting
3 process.

4 THE COURT: Well, in fairness, it would not support a
5 conclusion that they are not part of the collective action. If
6 they are members of the media, they were not participants.

7 MR. SPIEGEL: But the City takes the possession that,
8 no, they saw everyone, regardless of whether or not they were
9 media or not, engaging in the collective action.

10 THE COURT: I agree there is a tension between several
11 points made by the City, but I'm asking you a different
12 question.

13 So if the City sorted out, by media credential --

14 MR. SPIEGEL: Is that a sufficient sort?

15 THE COURT: -- wouldn't that be exactly what is
16 contemplated in something like Bernini?

17 MR. SPIEGEL: No. I think that Bernini at least says
18 what we looked at, what we tried to do, was to isolate the
19 group that we believed had committed the unlawful act. And we
20 separated out people that we didn't think committed an unlawful
21 act. Whether or not someone is carrying a press credential is
22 not the condition, is not a basis upon which to distinguish
23 whether or not someone had previously been committing an
24 unlawful act.

25 THE COURT: Yeah, there again, but I think the group

1 probable cause concept turns on membership in the collective
2 and illegal activity; right?

3 MR. SPIEGEL: Yes.

4 THE COURT: So the members of the media are not gonna
5 fall into the first category, are they?

6 MR. SPIEGEL: No. But many members of the media were
7 there. And the basis for distinguishing was not whether or not
8 you were actually participating in the illegal activity. As it
9 turned out, the bases for distinguishing was whether or not you
10 were carrying around a tag after the fact.

11 THE COURT: Well, again, I think one of the criteria
12 requires there to be membership. If you have a thousand people
13 and the goal is to stop traffic on Broadway and 42nd Street at
14 that intersection, the goal is to get as many people into the
15 intersection as possible to stop the flow of traffic. If you
16 are not among the first hundred, maybe you're not in the
17 intersection. But you are still going to be subject to arrest,
18 I would think, because you are part of the group, you
19 understood what the group was doing, the goal was to violate
20 the law.

21 If you are a press person who is not part of the
22 group, just watching what is going on, if you are violating
23 the -- the local traffic law ordinance, then you could be
24 arrested on your own, but I don't think you are arrested just
25 because you are tagging along with the group.

1 MR. SPIEGEL: I'm not suggesting that it was not
2 proper to release people who were clearly part of the media,
3 I'm suggesting that the sorting process was not a sufficient
4 one to actually distinguish between the people who they claim
5 were violating the law.

6 THE COURT: All right. I get that.

7 MR. MOORE: Just a couple of responses to the issues
8 raised by Mr. Farrell and by the Court, in some of the
9 questions.

10 They didn't in fact sort it out later. They didn't
11 take people to Pier 57 and sort it out later as you suggested
12 they might have done. There was no attempt, at any time,
13 either during the arrest at 16th Street, other than the effort
14 made by Johnson Courtright which we say was not sufficient as a
15 matter of law, anyway.

16 THE COURT: But look, what Mr. Farrell says is that
17 you have the testimony of those two officers, and then you have
18 video that shows a lot of people walking out of there. And I
19 mean it's clearly not the situation -- it's very different than
20 Fulton Street, frankly, where the orange fencing goes around
21 that whole group and nobody is getting out at that point.
22 There is a lot of people moving in and out for minutes --

23 MR. FARRELL: Well, the whole --

24 THE COURT: -- after -- after, you know, they had been
25 told that this is illegal activity, right?

1 MR. MOORE: Well, they have been -- nobody was told
2 anything, no announcement, no directive, no anything by the
3 police at 16th Street that there was illegal behavior going on;
4 no notice, no warning order to disperse, none of that happened.
5 In fact, all --

6 THE COURT: Certainly on the video, there is officers
7 telling people that if you want -- if you don't want to get
8 arrested, you'd better get out of here, right?

9 MR. MOORE: Fair enough. There are some officers say
10 that. The question is were the efforts made by NYPD at 16th
11 Street reasonably calculated to advise people who were not
12 engaged in unlawful conduct so as to avoid this group arrest,
13 that they had a right to leave. And we don't think, under any
14 stretch of the imagination that happened.

15 There is only, Essig, himself, only says there were
16 two officers who went down the street and came back, there was
17 no amplification for what they were saying, they didn't give
18 them any instructions about what to say. They only spent a few
19 minutes, at most. There was no directive given to any of the
20 officers at the barricade about whether they could or could not
21 permit people to leave. In fact, all of the plaintiffs in
22 Macnamara, and if you look at our Rule 56.1 statement, all of
23 them say they went up to the line and asked to be allowed to
24 leave and were denied that, denied permission to leave. All of
25 them say that. In fact, not just the Macnamara plaintiffs, but

1 the additional plaintiffs in the other cases say that as well.

2 So and it's undisputed that people did try to leave
3 and were prevented from doing that. And it's undisputed that
4 people were not permitted to leave, at least -- at least many
5 of the people, and certainly enough to suggest that no
6 reasonable effort was made to really do this sorting process.
7 I don't think you can conclude that any sorting of competent
8 basis was ever done by the police. Simply sending two officers
9 down the street for a couple of minutes without any
10 direction -- in fact, what they were really doing, if you read
11 Courtright and Johnson's deposition, is that they were focusing
12 on the business owners to tell them to shut their doors and to,
13 you know, shut the garage -- there was a big garage there, you
14 see the garage on the video. So I just think that there was
15 no -- as you said, the record is very thin with respect to the
16 effort to call out, unlike in Bernini.

17 THE COURT: I'm not sure the record is so great in
18 Bernini, honestly. What is there is the number of people who
19 were let go, and I think the amount of time that was used to
20 sort.

21 MR. MOORE: With respect to the video that Mr. Farrell
22 spoke about, that Mr. Rothman in his brief at footnote four
23 lays out the circumstances of that. And I would -- that's one
24 of the briefs that was submitted. And we would, you know,
25 direct the Court so that it's clear that if you really look at

1 the video, that the person who was getting out, individually
2 Bradley Will, who is no longer with us, had simply slipped out
3 when the cops were looking the other way.

4 In fact, he says at the beginning he was down at -- in
5 the video -- Irving Place and was pepper sprayed when he tried
6 to get out there. So that doesn't suggest that there was any
7 sort of uniform or consistent efforts by the police at this
8 location to cull out the dolphins from the tuna, as you say.

9 With respect to the no summons policy, Judge, let me
10 say something else. Because, I think before I go to the no
11 summons policy, I think there was a suggestion that the
12 admission that was entered into the record by Judge Francis
13 with respect to the lack of individual personal knowledge about
14 what the plaintiffs did, the City has now had 8 years of this
15 litigation to try to come up with some identification of some
16 specific facts with respect to any of our plaintiffs and they
17 failed to do so, other than with respect to one plaintiff at
18 the library, which is not part of this motion. So, I would
19 submit to you that they have had sufficient time to do that,
20 they failed to do that, and I don't -- they haven't -- they
21 haven't done, they don't they think they need to do it, or they
22 tried to do it and it's just not there.

23 Finally on the no summons policy, Judge, in addition
24 to the argument made by Mr. Dunn, it's clear to me that this no
25 summons policy runs afoul of the First and Fourteenth

1 Amendment. And particularly the Fourteenth Amendment
2 because -- and I think it no more graphically demonstrated by
3 the quality of life effort which was specifically part of the
4 RNC enforcement effort. And there were hundreds of people
5 arrested, as Mr. Dunn said, in and around Madison Square
6 Garden. The quality of life effort was directed at RNC venues,
7 and hotels, and the Madison Square Garden; any venues where
8 there were likely to be RNC delegates or RNC business
9 happening. And those people, there was over 500 officers
10 assigned to this effort as part of the overall law enforcement
11 effort. They clearly focused on RNC-related events. Anybody
12 charged with a violation summons-eligible offense, and there
13 were hundreds of them. And we provide -- we give you the
14 numbers in our brief. Anybody charged with the summonsable
15 offense was given a summons in those circumstances. And so I
16 really think it illustrates, to me anyway, that you have a
17 policy if it, in fact, is based on the concern about terrorism,
18 how can you justify a policy that says somebody arrested for
19 having an illegal cart in front of Madison Square Garden, or
20 somebody charged with disorderly conduct in front of Madison
21 Square Garden an, who is not connected to some kind of
22 demonstration or protest activity, does not pose the same kind
23 of threat, potentially, to those these events that were
24 happening in the City at that time, than somebody who is
25 demonstrating.

1 In fact, one could argue that somebody in that
2 context, driving around in an unlicensed van, clearly evident
3 than some of the other people who were given summons, might
4 pose more of a threat. The fact is that it's a policy that
5 specifically targeted protest activity. And there is a
6 comparator. The comparator comes right from their own records,
7 the quality of life offensive. And so we haven't moved for
8 summary judgment on that policy, although I do think that,
9 assuming on 14th Amendment grounds we might be entitled to
10 summary judgment, but I'll leave that up to the Court.

11 In any event, I do thank you for your time and your
12 careful consideration of the issues. And we respectfully
13 request that the Court grant these motions for summary judgment
14 on behalf of the plaintiffs.

15 THE COURT: And deny the ones for them, right?

16 MR. MOORE: Yes, Judge.

17 THE COURT: All right, Mr. Farrell.

18 MR. FARRELL: Your Honor, I'll just take those issues
19 in reverse order.

20 On the equal protection claim, the evidence that
21 plaintiffs have put in regarding the quality of life, first of
22 all, the quality of life team was in effect for a month prior
23 to the RNC. And that's demonstrated in the -- that's stated
24 explicitly in the exhibit that Mr. Moore attached. There are
25 three exhibits relating to the quality of life. And when you

1 look at the period of time for which it was in operation, it
2 was for a month prior to the RNC and during the RNC.

3 So there is no way to tell from that exhibit which,
4 when summons were given, whether they were given prior to the
5 RNC, or during the same time as when the policy, no summons
6 policy for the RNC was in effect, that's the first thing. So
7 that evidence is not competent on that point.

8 The second thing is that they have given no -- there
9 is no evidence on the equal protection claim as to who the
10 proper comparative class would be. You can't, even if you
11 assumed that their quality of life exhibits related only to the
12 same time period as when the RNC no summons policy was in
13 effect, which it doesn't. But if you assume that, there is no
14 way to tell from just the number of summonses what those people
15 were engaged in, when they got summons or didn't. You don't
16 know, just on the face of that document, whether that person
17 was engaged in First Amendment activity, or was not engaged in
18 First Amendment activity. That's a burden that is on
19 plaintiffs on equal protection claim. So their claim fails
20 because they have not satisfied that component of equal
21 protection. They have not shown submitted, admissible evidence
22 on who the comparative class should be.

23 The last point on that is there is absolutely no
24 evidence in the record of animus on behalf of the police
25 department. It is completely devoid of animus. They have

1 taken -- 2005. They have taken almost 6 years of deposition
2 testimony. They deposed the chief of department for nine days
3 over four, five years resulting in 1900 pages of testimony.
4 They have deposed Commissioner Cohen over multiple days
5 resulting in thousands of pages of testimony. There has been
6 hundreds and hundreds of depositions in this case. And through
7 that entire time, we're before you today on summary judgment
8 motions, and they have not put before this Court one single
9 piece of evidence that the City had an animus to retaliate or
10 get back at protesters or demonstrators.

11 As to Schiller and Dinler's counsel's point about
12 Commissioner Cohen and the disclosure being made and the timing
13 of that disclosure, that was a technical issue before
14 Magistrate Francis. The fact of the matter is, Magistrate
15 Francis said you need to put them explicitly in 26A disclosure.
16 But the fact of the matter is, over the years of testimony
17 before that, many people had testified about Commissioner
18 Cohen's role in providing the intelligence information upon
19 which the policies were based. And Mr. Dunn wanted additional
20 discovery in that matter. And that was the only bases for
21 allowing the discovery, additional discovery, that we as the
22 City, did not explicitly list Commissioner Cohen as witness in
23 26A disclosure. So this was not a secret about Commissioner
24 Cohen, it as not a last minute attempt by the City to create
25 some evidence to defend the policies.

1 And what goes hand in hand with that is that
2 Commissioner Cohen -- I'm sorry, Chief Esposito, who was
3 deposed both before after that, through the nine days of
4 deposition over multiple years, he never waived on what the
5 reasons were for the policy. They were always the same, he
6 reiterated them time and time again, and that doesn't change.
7 The fact the plaintiff's counsel points to that Commissioner
8 Cohen doesn't remember the policy, Commissioner Cohen is not a
9 policy --

10 THE COURT: Commission Cohen or Esposito.

11 MR. FARRELL: Chief Esposito remembered the policy.

12 THE COURT: Oh --

13 MR. FARRELL: He was unwavering on the reasons the
14 policy was adopted. The things that he -- he was not so sure
15 of was who attended what meeting when. And these are in
16 depositions regarding meetings that took place in 2004. The
17 depositions are in 2006 and 2010, several years after the
18 activity. And plaintiff's whole case boils down to, oh, well,
19 the chief of the department who has a myriad of
20 responsibilities and duties, who attends thousands of meetings,
21 can't remember exactly who was at a particular meeting.

22 The bottom line is the chief of the department was
23 provided the reasons the policies were adopted, never wavered
24 on what those were. And the fact that Commissioner Cohen
25 doesn't recall the policy, he was not a policymaker. His role

1 in the department to collect information and provide it to the
2 policymakers. He is not a policeman, he spent his time at the
3 CIA gathering intelligence. So that fact does not -- is
4 immaterial to the reasons why the policies were adopted.

5 And then on whether the policy content neutral, I
6 would point the Court to the cases that we cite in our brief,
7 Ward and those other cases, and I think on the undisputed facts
8 of this case, that those lead to the conclusion that the policy
9 was content neutral.

10 I have to add one thing that was raised for the first
11 time in reply by plaintiff's counsel. One was that after
12 the indictment, 16th Street testified they observed people
13 leaving the block. So when he asked for facts and when he was
14 responding to that, that was an additional fact that is in the
15 record, on top of the other facts, that makes it reasonable
16 for them to believe that the people they had at the end of that
17 period were the ones who intended to stay there and continued
18 to participate in the unlawful activity. And then the last
19 thing he said was someone got pepper sprayed, no one got
20 pepper sprayed trying to leave the block. It was a non
21 sequitur, so I'm not sure what the record of someone being
22 pepper sprayed on 16th Street had to do whether people had an
23 opportunity to leave the block, or whether the people placed
24 under arrest, in fact it was reasonable to believe for the
25 police to believe that those were the ones that had engaged in

1 unlawful conduct.

2 MR. ROTH: May I address the last statement about the
3 pepper spray, because it relates to this video that's been
4 referenced. This as my former client, Brad Will. He brought a
5 suit --

6 THE COURT: Are you going to let me say "yes" or "no."

7 MR. ROTH: I thought you would indulge me, but please.

8 THE COURT: Well, I might.

9 But Mr. Roth, since the City went over, I have given
10 you more time, I'm going to let Mr. Roth get the last word.

11 MR. ROTH: Very briefly, your Honor.

12 Mr. Will was a videographer. He's seen on the video
13 that is referenced entering the block of 16th Street and going
14 westbound on the northern sidewalk. When he gets to Irving
15 Place, an officer -- you can see it very clearly on the video.
16 As they are constructing the line, an impermeable line, from
17 building line to building line, takes out a canister of pepper
18 spray, sprays it from hip level, and the pepper spray actually
19 lands on his camera as he was going up to try and talk to the
20 officer. You hear him say, why did you pepper spray me, why
21 did you pepper spray me, no response. He then goes into the
22 block, has a conversation with Lieutenant Johnson. Asked
23 Lieutenant Johnson, can the people go back to the park.
24 Lieutenant Johnson, one of the two Lieutenant that Essex
25 dispatched said, yes, go on the sidewalk. And they go back

1 towards the park, they can leave.

2 And when Essig was asked in his deposition whether or
3 not Johnson was authorized to say, that Essig said, no, they
4 couldn't leave, because at that point everybody was going to be
5 arrested. Which illustrates the unreasonableness and a lack of
6 coordination of the police at that scene.

7 And in terms of how he got off the block, you can see
8 very clearly on that video that Mr. Will snuck out of the block
9 as the officers on the Union Square east side were starting to
10 come in to effect the arrest. It was very crafty of him, very
11 stealthy, I congratulate him on his stealthiness, but it was
12 not indicative as to whether or not the 300 people on that
13 block would have been able to have left at either one of the
14 sides of the block, which had impermeable police lines. And I
15 will refer you to the reply brief which discusses the video and
16 the footnote.

17 THE COURT: It's not whether 300 people would have
18 been free to leave, it's whether people not involved in illegal
19 activity and were not part of the group. So it's whether the
20 dolphins could leave, not whether the tuna could leave, right?

21 MR. ROTH: Well, and Mr. Moore has discussed very
22 clearly, and Mr. Dunn, as well, that sending two lieutenants
23 without amplification up and down the block for a period of
24 five minutes to have one-on-one conversation with a shifting
25 mass of humanity, many of whom nobody could tell looking at

1 these people whether or not they had marched in the street,
2 whether or not they just were walking down the sidewalk,
3 whether they had come out of a cafe, whether or not they had
4 entered -- like Mr. Dunn's client from the Irving Place side
5 whether or not, like my client Betty Bastidas, and multiple
6 people visible on that video who crossed over after the police
7 had directed the whole group of people onto the block, there is
8 a pulse of people who are seen on the defendant's videos who
9 crossed directly from Union Square Park, because they're
10 curious, because there is a marching band on a street on a
11 beautiful summer evening. People are drawn by the music, check
12 it out and see what's going on. They have a First Amendment
13 right to do that, which hasn't been mentioned. So people, they
14 gravitate it towards this block, lines are thrown up on the
15 block. There is no remotely reasonable attempt made to tell
16 everybody who was present there, if you don't want to get
17 arrested, you need to go on your way now, because we need to
18 clear this street. Essig, in fact, says that everyone on that
19 block, other than those few episodic people that Johnson and
20 Courtright happened to go up to and say without any criteria,
21 oh, you can leave, you can leave. Everybody on that block, the
22 intent was to arrest everybody on that block, Essig said that.
23 And it's clear he didn't communicate appropriately with
24 Johnson, because Johnson gave people instructions that Essig
25 explicitly testified he was not authorized to give. And

1 Johnson told the people go on the block. And you can see on
2 the video, Mr. Will in response to Johnson tells the people, go
3 on the sidewalk, and go just on the sidewalk back to the park
4 and you can leave. And they could not. Because everybody on
5 that block was going to be arrested.

6 So I would refer you to that video and to the
7 discussion of it in my reply brief. And I would rely on the
8 statements of my colleagues, as a matter of law, the attempt to
9 notify 300 people, 400 people, on an entire city block, right,
10 it is unreasonable as a matter of law for two people without
11 amplification to mill around and have private conversations and
12 say, you're dolphin, you should leave.

13 THE COURT: Your view is that had the police cordoned
14 off the entire street, made an announcement that says dolphins
15 are free to leave, show your credentials to the officers at the
16 south end or west end, and then they came through and showed --
17 I don't know what the criteria would be, but the police
18 basically said, yeah, you look like a dolphin, you can go, no,
19 you're a tuna, you have a saxophone in your hand, you're
20 staying, that would have been okay, that would have passed
21 muster.

22 MR. ROTH: What would have passed muster is if they
23 made an appropriate amplified dispersal order to put people on
24 notice that they had to leave and gave reasonable opportunity
25 for people to leave, and if they had some specified

1 individualized knowledge that such a person was a lawbreaker,
2 let's say a saxophonist, let's say a particular cop saw a
3 particular saxophonist who he recognized was marching in the
4 street playing, you know, When The Saints Come Marching In, and
5 that cop recognized that saxophonist, so arrest that
6 saxophonist, don't arrest my client, Betty Bastidas, with
7 United Nations Press passes around her neck, or Thea Rigby, who
8 also had press credentials, or the other four people who
9 Mr. Upton and I represent, who had no indicia that they were
10 involved with any march or parade, because they were not. They
11 just happened to be in the Union Square area, heard something
12 boisterous going on, wanted to check it out. They were dressed
13 in regular civilian clothes, Ms. Caspa was on her way to visit
14 her sick aunt, another one just come from shopping. They were
15 just in the area and went over to check it out. And so nobody
16 could ever have had a reason to think that they were -- I don't
17 know which one is the bad one, the tuna or dolphin.

18 THE COURT: The dolphins are good tasting, but high in
19 mercury.

20 MR. ROTH: Nobody could have thought they were tuna.
21 There was no indication for any reasonable officer to think
22 that they were not a dolphin. And so there was no remote
23 reason for them to think they had probable cause to arrest the
24 clients that Mr. Upton and I represent, and everybody else who
25 was on that block, unless they had some particularized reason

1 to think that they had broken some particularized law.

2 And Essig admits he had no idea who was or was not on
3 the sidewalk, and who was or was not in the roadway.

4 He admits that.

5 THE COURT: Thank you. Stop you now, just because
6 we're exactly the same.

7 MR. ROTH: Thank you, your Honor.

8 THE COURT: Each of you got an hour and 16 minutes, so
9 I think -- actually, now, the plaintiffs get 30 seconds more.

10 I'll give you 30 seconds, Mr. Farrell, that's how
11 scrupulous I am. The court reporter is gonna kill me.

12 MR. FARRELL: Take my thirty seconds.

13 Mr. Rothman admitted that his clients were there, that
14 they were proceeding with the group as it came down. It's not
15 what is in their head that is important, it's whether the
16 police officers really believed --

17 THE COURT: No, I get the standard.

18 MR. FARRELL: And another thing I would point to is in
19 case in Carr in the Second Circuit case, the Court there
20 recognizes that on the facts of that case, the people that came
21 and were part of the march or perceived to be part of the
22 march, do not have a claim for false arrest. They said the
23 only people under the facts of that case would be, assuming
24 that they were perceived to be engaging in unlawful activity,
25 that that was shown, would be the people that were in the

1 alleyway, because the group, if you remember, disbursed and ran
2 in an alleyway. So the cops lost sight of who was there,
3 whereas in our case everybody is located right around the
4 group. In the alleyway, the Carr case says the only people in
5 Carr who would have a false arrest claim, are the ones who if
6 it was not reasonable that the police then closed off the block
7 and people had gotten in through the line. It says that you
8 have to read the case very carefully, there's two specific
9 segments in the case that say that.

10 THE COURT: I don't want to overstate the Eighth
11 Circuit's opinion, it's not binding and pressing on me, it's on
12 point. And so I have looked at it. And you have all cited it.
13 But we shouldn't overstate the significance of it.

14 MR. FARRELL: The Carr case was out of the DC Circuit
15 page 406 and 409, but that points to the fact that there was no
16 case law in the Second Circuit addressing these issues. The
17 law was not clearly established, and the clients had a minimum
18 of ties to qualified immunity.

19 THE COURT: It's now 6:10, it's been a long day. I
20 want to thank all who argued, and all who assisted to prepare
21 them. And the court reporter who doesn't get a break the
22 entire time.

23 I'll thank the court security officer and -- no
24 applause. And you should clear out of here in 10 minutes or he
25 is going to summons you. I don't mean to make light of this,

1 obviously these are very important issues that have great
2 implications for many people. So it's a source of great regret
3 for me that this is taking so long. That's the nature of mass
4 arrest cases. And there are others out there that have taken a
5 long time.

6 I do want to get this moving. Discovery took forever.
7 And I'm not blaming anybody for that, but we now have to really
8 get this going. So I am going to reserve for a very short
9 period so I can collect my thoughts, absorb the arguments that
10 have been made, but I want to turn this around quickly. And
11 then after I rule, I suppose then we'll talk about what's next,
12 because I think depending on how I rule will affect the answer
13 to that question, okay.

14 MR. FARRELL: I would just like to say while I was
15 speaking I also want to give credit to the entire team that was
16 behind me, while I was the one --

17 THE COURT: This isn't the Oscars, Mr. Farrell.

18 MR. FARRELL: I just wanted to give credit to the
19 entire team behind me. Thank you.

20 THE COURT: And we're adjourned.

21 (Adjourned)
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